presidential documents

[3195–01]

Title 3—The President

PROCLAMATION 4540

Anniversary of the Adoption of the Articles of Confederation

By the President of the United States of America

A Proclamation

In the midst of our struggle for independence the Continental Congress, meeting in York, Pennsylvania, recognized that the new Nation would require a permanent central government. Not only was unity necessary if that struggle was to be successfully concluded, but it was essential if the new Nation was to be able to deal effectively with such matters as regulating trade, disposing of western lands, and controlling finance.

Although the colonists shared a common heritage and spoke a common language, their customs, traditions and economic needs varied. Because of this their loyalties were regional in nature. These differences were overcome and, on November 15, 1777, the Continental Congress adopted the Articles of Confederation.

The Articles of Confederation became our first constitution and served the new Nation from 1781, when they were ratified, until 1789. Much of what we learned about government during that period became part of our Constitution and our heritage.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, do hereby proclaim Tuesday, November 15, 1977, as a Day of National Observance of the Two Hundredth Anniversary of the Adoption of the Articles of Confederation by the Continental Congress convened in York, Pennsylvania, and I call upon the people of the United States to observe that day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of November, in the year of our Lord nineteen hundred seventy-seven, and of the Independence of the United States of America the two hundred and second.

Jimmy Carter

[FR Doc.77-33311 Filed 11–15–77;1:07 pm]

rules and regulations

[4910–22]

Title 23—Highways

CHAPTER I—FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

SUBCHAPTER B—PAYMENT PROCEDURES

PART 160—STATE FISCAL PROCEDURES AND REPORTS

Transfer of Highway Safety Funds; Revision

AGENCY: Federal Highway Administration, DOT.

ACTION: Final rule.

SUMMARY: This rule sets forth the procedures and requirements for the transfer of highway safety funds from one categorical grant program to another as permitted by the Federal-Aid Highway Act of 1976.

EFFECTIVE DATE: November 16, 1977.

FOR FURTHER INFORMATION CONTACT:

Joseph A. McCaffrey, Office of Fiscal Services, 202–426–0674; Kathleen S. Markman, Office of the Chief Counsel, 202–426–0824, Federal Highway Administration, 400 Seventh Street SW., Washington, D.C. 20590. Office hours: Monday-Friday 7:45–4:15 EST.

SUPPLEMENTARY INFORMATION: This regulation replaces the existing regulation found at 23 CFR Part 160 Subpart C as redesignated at 41 FR 54169 (December 13, 1976). The regulation is issued in order to conform to the requirements of 23 U.S.C. 104(g), as amended by section 206 of the Federal-Aid Highway Act of 1976 (Pub. L. 94–280, May 5, 1976).

This regulation is related to a grant, benefit, or contract within the purview of 5 U.S.C. 553(a)(2), therefore, general notice of proposed rulemaking is not required.

NOTE.—The Federal Highway Administrator has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Orders 11821 and 11949 and OMB Circular A–107.

Issued on: November 7, 1977.

WILLIAM M. COX,
Federal Highway Administrator.

In consideration of the foregoing, subpart C of part 160, Subchapter B, Chapter I of title 23 of the Code of Federal Regulations is amended to read as follows:

Subpart C—Transfer of Highway Safety Funds

Sec.

AUTHORITY: 23 U.S.C. 104(g) and 315; 49 CFR 1.48(b).

Subpart C—Transfer of Highway Safety Funds

§ 160.301 Purpose.

To prescribe the procedures for transfer of funds among highway safety programs under 23 U.S.C. 104(g), as amended by section 206 of the Highway Safety Act of 1976.

§ 160.303 General.

(a) For the purpose of 23 U.S.C. 104(g), the terms "apportioned" and "apportionment" include the terms "allocate" and "allocation".

(b) Funds apportioned from General Funds may not be transferred to funds apportioned from the Highway Trust Fund. Funds apportioned from the Highway Trust Fund may not be transferred to funds apportioned from the General Fund.

(c) The transfer provisions involve the following funds:

(1) Apportionments financed from the Highway Trust Fund:

(i) Special Bridge Replacement,

(ii) High Hazard Location,

(iii) Elimination of Roadside Obstacles,

(iv) High Hazard Locations/Elimination of Roadside Obstacles, and

(v) Rail-Highway Crossings, On-System.

(2) Apportionments financed from the General Fund:

(i) Rail-Highway Crossings, Off-System, and

(ii) Safer Off-System Roads.

(d) Funds transferred to any apportionment are to be expended under the provisions of law governing expenditure of the apportionment to which the transfer is made.

(e) Funds under obligation are not eligible for transfer.

(f) Transfers may be approved only between funds apportioned for the same fiscal year.

§ 160.305 Transfers Among Trust Fund Apportionments.

(a) Not more than 40 per centum of the funds apportioned in any fiscal year to each State may be transferred from one apportionment (§ 160.303(c)(1)) to any other apportionment if the transfer is requested by the State highway department and is approved by the Federal Highway Administration (FHWA) as being in the public interest.

(1) Not to exceed 50 percent of the amount transferred under § 160.305(a) of this part from the rail-highway crossing apportionment may be transferred from the half of the apportionment reserved for installation of protective devices.

(2) Transfers to the rail-highway crossing apportionment may be used for either protective devices or the elimination of other hazards.

(b) One-hundred percent of the funds apportioned in any fiscal year to each State may be transferred from one apportionment (§ 160.303(c)(1)) to any other apportionment if the transfer is requested by the State highway department, and is approved by FHWA as being in the public interest, if FHWA has received assurances from such State highway department that the purposes of the program from which such funds are to be transferred have been met.

§ 160.307 Transfers Between General Fund Apportionments.

(a) All or any part of the funds authorized for the rail-highway crossing program off-system (Section 203(c) of the Highway Safety Act of 1973, as amended) may be transferred to the safer off-system roads apportionment (23 U.S.C. 219) if the State highway department requests the transfer and provides satisfactory assurances that the purposes of Section 203 have been met.

(b) A transfer between General Fund apportionments does not effect a transfer of obligation authority or liquidating cash. Obligation authority and liquidating cash for the transferred funds must be provided by appropriation action before they can be obligated.

[FR Doc.77-33112 Filed 11-15-77;8:45 am]

[7545–01]

Title 29—Labor

CHAPTER I—NATIONAL LABOR RELATIONS BOARD

PART 100—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Subpart A—General Provisions

AGENCY: National Labor Relations Board.

ACTION: Addition to regulations.

SUMMARY: Section 100.735 contains general provisions covering employees'

responsibilities and conduct and this addition establishes the procedure for the filing, approval and payment of claims for personal injury or death, damage or loss of property caused by the wrongful act of an agency employee while in the performance of his official duties.

EFFECTIVE DATE: November 16, 1977.

FOR FURTHER INFORMATION CONTACT:

George A. Leet, Esquire, Associate Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue NW., Washington, D.C. 20570.

The National Labor Relations Board hereby promulgates an addition to § 100.735, Subpart A, Chapter I, Title 29 of the Code of Federal Regulations by adding the following section:

§ 100.735–6 Claims under the Federal Tort Claims Act for loss of or damage to property or for personal injury or death.

(a) *Filing of claims.* Pursuant to 28 U.S.C. 2672, any claim under the Federal Tort Claims Act for money damages for loss of or injury to property, or for personal injury or death, caused by the negligent or wrongful act or omission of any employee of the National Labor Relations Board while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such loss, injury or death in accordance with the law of the place where the act or omission occurred, may be presented to the Director of Administration, 1717 Pennsylvania Avenue NW., Washington, D.C. 20570, or to any regional office of the National Labor Relations Board, at any time within 2 years after such claim has accrued. Such a claim may be presented by a person specified in 28 CFR 14.3, in the manner set out in 28 CFR 14.2 and 14.3, and shall be accompanied by as much of the appropriate information specified in 28 CFR 14.4 as may reasonably be obtained.

(b) *Action on claims.* The Director, Division of Administration, shall have the power to consider, ascertain, adjust, determine, compromise, and settle any claim referred to in, and presented in accordance with paragraph (a) of this section. The Chief, Security and Safety, can process and adjust claims under $100 in accordance with delegated authority from the Director. Legal review is required by the General Counsel or designee for all claims in the amount of $1,000 or more, 28 CFR 14.5. Any exercise of such power shall be in accordance with 28 U.S.C. 2672 and 28 CFR Part 14.

(c) *Payment of awards.* Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section will be paid by the Director of Administration out of appropriations available to the National Labor Relations Board. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section will be obtained in accordance with 28 CFR 14.10.

Dated at Washington, D.C., November 10, 1977.

By direction of the Board.

GEORGE A. LEET,
Associate Executive Secretary,
National Labor Relations Board.

[FR Doc.77-32929 Filed 11-15-77;8:45 am]

[1410–03]

Title 37—Patents, Trademarks, and Copyrights

CHAPTER II—COPYRIGHT OFFICE, LIBRARY OF CONGRESS

[Docket RM 77–5]

PART 201—GENERAL PROVISIONS

Warning of Copyright for Use by Libraries and Archives

AGENCY: Library of Congress, Copyright Office.

ACTION: Final Regulation.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting a new regulation pertaining to the use by libraries and archives of certain warnings of copyright in connection with their photo-duplication and related activities. The regulation is adopted to implement sections 108(d)(2) and 108(e)(2) of the Act for General Revision of the Copyright Law. The effect of the regulation is to prescribe the content, form, and manner of use of the warnings of copyright identified in those sections.

EFFECTIVE DATE: January 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Jon Baumgarten, General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559, 703–557–8731.

SUPPLEMENTARY INFORMATION: Sections 108(d) and 108(e) of the first section of Pub. L. 94–553 (90 Stat. 2541) set forth conditions under which specified libraries and archives, or their employees acting within the scope of their employment, may make and distribute single copies and phonorecords of certain copyrighted works, or parts of works, without the consent of the copyright owner. Among other conditions specified in the Act, the library or archive must "display prominently, at the place where orders (for copies or phonorecords) are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."

On March 30, 1977, we published in the FEDERAL REGISTER (42 FR 16838) an Advance Notice of Proposed Rulemaking, inviting public comment to assist the Office in considering alternative forms of warning. After considering the comments received in response to the Advance Notice, on August 17, 1977 we published in the FEDERAL REGISTER (42 FR 41387) a Notice of Proposed Rulemaking to add a new § 201.14 to the regulations of the Copyright Office.

Twelve initial and reply comments were received in response to the Notice of Proposed Rulemaking. While most comments received recommended some modification of the proposed regulation, several suggestions were technical in nature or sought clarification of the proposed language. After careful consideration, we have decided to promulgate proposed § 201.14 with few substantive changes. A discussion of the major comments follows.

1. *The short form of warning.* In the proposed rulemaking, we noted that the primary purpose of the warning is to caution a user who has acquired a copy from a library or archives under section 108 as to that users' responsibilities under the copyright law. We specifically invited comment upon our proposal for a short warning, rather than an extensive one incorporating the numerous conditions governing the library's and archive's own obligations under paragraphs (a), (d), (e), and (g) of section 108. Although one comment proposed expanding the warning in significant detail, we have decided to adhere to our original conclusion that the "warning" should be precisely that: a brief, cautionary statement alerting the user that the making of a reproduction by a library or archive, and the subsequent use of the reproduction, are subject to the copyright law. Such a warning is an inappropriate device to set out accurately or meaningfully all of the institutional limitations and requirements of § 108.

2. *Conditions under which photocopies or other reproductions can be furnished; use of reproductions.* A number of comments raised questions concerning the second paragraph in the text of the proposed warning, which read:

> Photocopies or other reproductions can be furnished only under certain conditions, if they will be used solely for private study, scholarship, or research. Use of the reproduction for other purposes may make the user liable for copyright infringement.

Several questions centered around uncertainty as to whether the phrase "certain conditions" in the first sentence referred to use "for private study, scholarship, or research", or suggested additional statutory conditions not specified in the warning itself (namely, those in paragraphs (a), (d), (e), and (g) of section 108, referred to earlier). This latter interpretation is correct and the final regulation has been revised to make this clear.

A number of comments also questioned the failure to include a reference either generally to "fair use" or to certain illustrative usages set out in section 107 of the copyright law (criticism, comment, news reporting, and teaching). Since the test of user liability under section 108(f)(2), both for request for, and later uses of, reproductions made under section 108(d) is activity which exceeds the limits of "fair use" under section 107, and not solely use for purposes "other than private study, scholarship, or research", we have also revised the second sentence of the above-quoted paragraph.

3. *Other issues.* Several comments objected to the proposed specification of type sizes and cardboard stock. However, these specifications are helpful in providing certainty to the task of designing and printing the warnings and offer appropriate assurances that the warnings will serve their purpose. We have modified the provision that the warning be reproduced on cardboard stock to require that it be reproduced on "heavy paper or other durable material". We have also adopted one suggestion that a citation to title 17 of the United States Code be included in the warning.

The proposed regulation is adopted with changes, as set forth below:

Part 201 of 37 CFR Chapter II is amended by adding a new § 201.14 to read as follows:

§ 201.14 Warnings of copyright for use by certain libraries and archives.

(a) *Definitions.* (1) A "Display Warning of Copyright" is a notice under paragraphs (d)(2) and (e)(2) of section 108 of Title 17 of the United States Code as amended by Pub. L. 94-553. As required by those sections the "Display Warning of Copyright" is to be displayed at the place where orders for copies or phonorecords are accepted by certain libraries and archives.

(2) An "Order Warning of Copyright" is a notice under paragraphs (d)(2) and (e)(2) of section 108 of Title 17 of the United States Code as amended by Pub. L. 94-553. As required by those sections the "Order Warning of Copyright" is to be included on printed forms supplied by certain libraries and archives and used by their patrons for ordering copies or phonorecords.

(b) *Contents.* A Display Warning of Copyright and an Order Warning of Copyright shall consist of a verbatim reproduction of the following notice, printed in such size and form and displayed in such manner as to comply with paragraph (c) of this section:

NOTICE

WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

(c) *Form and Manner of Use.* (1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.

(2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

(17 U.S.C. 207, and under the following sections of Title 17 of the U.S. Code as amended by Pub. L. 94-553: 108; 702.)

Dated: November 10, 1977.

WALDO H. MOORE,
Assistant Register of Copyrights for Registration.

Approved:

DANIEL J. BOORSTIN,
Librarian of Congress.

[FR Doc.77-33111 Filed 11-15-77:8:45 am]

[6730-01]

Title 46—Shipping

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

[Docket No. 72-19; General Order No. 13]

PART 536—PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

AGENCY: Federal Maritime Commission.

ACTION: Denial of Petitions for Reconsideration and implemention of revised tariff filing regulations.

SUMMARY: Petitions seeking reconsideration of 13 sections of General Order 13 as it was revised on October 10, 1975 (40 FR 47770) are denied, but several amendments to the regulations are being made on the Commission's own initiative based upon Petitioners comments. These modifications relax some requirements complained of as overly stringent and make numerous editorial changes which do not alter the substantive effect of the rules. The principal modification is the renumbering of most sections to conform the format of the foreign commerce tariff filing rules to the Commission's recently enacted domestic commerce regulations (General Order 38, 42 FR 54810). Further rulemaking on intermodal tariff requirements and other matters is anticipated shortly.

EFFECTIVE DATE: January 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary, 1100 L Street NW., Washington, D.C. 20573, 202-523-5725.

SUPPLEMENTARY INFORMATION: The Commission has before it for decision five petitions seeking reconsideration of its foreign commerce tariff filing regulations, as revised on October 2, 1975 (General Order 13, 46 CFR Part 536, 40 FR 47770).[1]

The new features of the 1975 Rules fall into two general categories: (1) Changes designated to regulate post-1970 developments in intermodal transportation; and (2) changes designated to clarify and update technical tariff format and filing requirements. Both types of changes were intended to aid shippers and the Commission's staff in applying ocean carrier tariffs. Petitioners seek reconsideration of 13 individual provisions, including five existing regulations which were not substantively altered by the 1975 revisions. The challenged sections of the 1975 Rules are:

1. 536.1(e). Definition of Local Rates. "Should be made expressly synonymous with a carrier's port-to-port rate; the 1975 definition could be construed as *excluding* port-to-port rates." ANAFC and South Atlantic Group.

2. 536.1(k). Definition of Transshipment. "Inconsistent with parts of § 536.4; the word 'relay' should be added to the basic definition (first sentence) and 'feeder' and 'relay services' should be expressly excluded, regardless of whether such services are operationally controlled by the line-haul carrier." ANAFC and South Atlantic Group.

3. 536.1(m). Definition of Substitute Service. "Needlessly complex and substantive in nature; a thinly disguised attempt to enlarge the meaning of 'through intermodal transportation' to which additional tariff filing burdens attach." ANAFC and South Atlantic Group.

4. 536.1(p). Definition of Port. "Limiting the term 'port' to the place where actual transportation by water commences or terminates as to any *particular movement of cargo* favors LASH barge operators at the expense of other intermodal carriers; the definition should be constant for all modes of transportation; a port should be any place having water transportation facilities at which transportation by water does commence or terminate." Sea-Land.

5. 536.15(d)(1). Intermodal tariffs must contain a precise breakout of port-to-port rates for each commodity. "This is a harsh, commercially unreasonable, potentially disastrous practice in light of current intermodal arrangements between water and land carriers; inland carrier divisions are constants, and subject to container volume discounts, and calculated on a per container basis, while the through routes are calcu-

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[1] The effective date of the revised regulations (1975 Rules) was stayed pending disposition of the instant petitions. Foreign commerce carriers continue to operate under the previous General Order 13 regulations (Existing Rules).

Petitions were received from Sea-Land Service, Inc. (Sea-Land); the Association of North Atlantic Freight Conferences (ANAFC); Waterman Steamship Corp. (Waterman); five Trans-Pacific Freight Conferences (Trans-Pacific) and two U.S. West Coast/Latin America Conferences (Pacific Coast). Replies were tendered for filing by ANAFC and by a group of six U.S./Europe freight conferences (South Atlantic Group). Former § 502.261 of the Commission's Rules shall be waived to permit the filing of these replies.

lated on a weight or measurement basis." Trans-Pacific.

6. 536.4(a)(12). Tariff subscription price must include any bill of lading or rules tariff published by the carrier. "Section 18(b)(1) does not require carriers to *distribute* bill of lading tariffs to *all* their tariffs subscribers; many shippers do not need all the components of a carrier's tariff; it is sufficient that supplementary subscriptions be offered at a reasonable cost." Trans-Pacific.

7. 536.4(a)(4)(1). Tariffs listing a range of ports served must also include a specific listing of ports *not* served. "Section 18(b) does not provide an unequivocal answer on this point as evidenced by the Commission's long standing practice of accepting only a statement of the range of ports; the rule should at least permit carriers to serve *designated ports* in a range of ports with the proviso that undesignated ports may be served on an 'inducement subject to agreement' basis; the phrase 'any restriction applying at a port' should be modified to read 'any restriction under the control of or imposed by the carrier.'" ANAFC and South Atlantic Group.

8. 536.5(O). Conditional, temporary or emergency rates (including project rates) shall be listed under the appropriate commodity heading for each commodity affected. "Many projects involve hundreds of commodities and the materials shipped are often not described by the carrier in the same manner as its existing commodity descriptions; it is not enough to say that large projects may be granted special permission not to list each commodity; such a procedure is time consuming and troublesome for carriers and the present standard of 'impossibility' is unfair; it would be better to place the burden on the Commission by having the staff reject any unreasonably small or non-*bona fide* project filings; a new section should be inserted to read 'Project rates may be placed in a special section of the tariff providing that the Table of Contents or Commodity Index contain a specific reference to Project Rates.'" Pacific Coast and Waterman.

9. 536.6(a)(2). Amendments to dual rate contract rates may not be increased less than 90 days after a previous rate change has taken effect *and* before 90 days' notice has been given to contract shippers. "This rule conflicts with the pending proceeding in Docket No. 75-13." ANAFC, Sea-Land, and South Atlantic Group.

10. 536.4(b)(10)(v). Freight Forwarder compensatiln must be included in carrier tariffs. "The rule should be revised to state that tariffs include freight forwarder compensation 'on the ocean freight' because there is considerable confusion as to what a permissible basis for freight forwarder compensation might be." ANAFC and South Atlantic Group.

11. 536.9(c). Tariffs on imports to New York shall contain a rule which complies with General Order 8. "This rule conflicts with the pending evidentiary proceeding in Docket No. 73-55 pertaining to the application of General Order 8 to containerized imports." Sea-Land and ANAFC.

12. *536.5(L)*. When a dual rate system permits two rates to be employed, both the contract and the noncontract rates shall be published with each individual commodity item subject to the dual rate system. "This requirement is in the present tariff rules and was superseded by Circular Letter 10-74 upon the request of ANAFC members. The Circular Letter stated that the suspension was temporary and occasioned by the 'international paper and forestry products shortage,' a somewhat dubious basis not mentioned in ANAFC's waiver request. It should be sufficient for carriers to provide a formula for calculating dual rate contract discounts rather than publishing two rates for each commodity. To do otherwise would make the use of commodity coding data more difficult." ANAFC and South Atlantic Group.

13. *536.8(a)*. The last sentence of the rule states that "Section 14b of the Act does not permit * * * relief from the [advance filing] requirements of that section and applications for such permission will not be entertained." "A statutory prohibition against section 14b waivers exists *only* if section 14b were interpreted as a *notice* provision. Until Docket No. 75-13 is resolved by the Commission the last sentence of the proposed rule should be deleted as it prejudges the issue in that proceeding." ANAFC and South Atlantic Group.

In light of Petitioners' arguments and the Commission's recent experience in revising its domestic tariff regulations (Docket No. 76-40, 42 FR 54810) we have determined to make certain modifications in the 1975 Rules. The following *sua sponte* amendments are either of an editorial nature or ease 1975 requirements which were complained of as burdensome.

I. Part 536 has been renumbered to coincide with Part 531; 536.12 has been consolidated with §§ 536.2; and §§ 536.13, 536.14 and 536.17 have been combined in a single section captioned "Exemptions and exclusions."

II. The definitions of "through rate", "through route", "transshipment", "interchange", "substitute service", "absorption", "equalization", "port", "feeder service", "water carrier" and "intermodal transportation" have been temporarily withdrawn from § 536.1 to avoid possible conflict with recent court cases concerning intermodal transportation and the Commission's General Order 38. The definition or "carrier" was conformed to the definition in the Existing Rules, except that an express reference to nonvessel operating carriers was added to avoid any claim that the Commission has altered its long standing recognition of nonvessel operating carriers as section 1 carriers.

III. Section 536.14 governing through intermodal transportation tariffs has been withdrawn and existing § 536.16 adopted in its place, thereby temporarily removing the requirement that tariffs contain a precise breakout of the port-to-port rates for each commodity carried. Existing § 536.16 contains its own definitions of "through rate" and "through route." The reference to "through intermodal transportation" in § 536.1(u) was also deleted in light of the withdrawal of §§ 536.14 and 536.1(r).

IV. A reference to the Commission's statutory responsibilities to police and prevent unduly discriminatory and prejudicial practices pursuant to Shipping Act sections 15, 16, and 17 has been added to §536.0. Tariff regulations which rely upon statutory authority in addition to that of sections 18(b) and 14b is consistent with past Commission action and the purposes of the Shipping Act. "Filing of Through Rates and Through Routes." 35 FR 6394, 6397 (1970); "Report in Docket No. 875" (General Order 15), 30 FR 12682 (1965).

V. Section 536.16 establishes an effective date for the 1975 Rules which has long since passed. A new effective date is stated in the dispositive language of the instant Order and § 536.16 has been deleted.

VI. Section 536.4(a)(12) has been relaxed to permit carriers to offer individual subscriptions to bill of lading tariffs, rules tariffs, or other major components of their total tariff filing rather than charging a single subscription price which includes all tariff material on file, regardless of its usefulness to particular shippers. It is expected, however, that carriers will provide subscription information which can be readily understood by shippers and which clearly identifies the various tariff components available and the charge assessed for each.

VII. Section 536.6(a)(2) has been modified to coincide with the Commission's final decision in Docket No. 75-13, 17 SRR 305 (1977). *I.e.*, contract rates may be increased after 90 days' notice to contract shippers without regard to the length of time the rate has been in effect.

VIII. Section 536.5(O) has been mitigated by the addition of a new subsection which permits *bona fide* multiple commodity "project rates" to be printed in a special tariff section whenever the tariff contains a Table of Contents clearly identifying the existence of such a "project rates section."

IX. Section 536.8(a) has been amended to eliminate the last sentence which flatly proscribed the filing of requests for special permission to increase Merchant's Contract rates upon short notice. The Commission wishes to reserve judgment on this point until it has an appropriate opportunity to consider the matter in greater depth. In the interim, any such requests shall be entertained on an *ad hoc* basis.

These amendments moot Petitioners' stated objections to Items 1, 2, 3, 4, 5, 6, 8, 9, and 13, above. We wish to stress, however, that this action is taken only as an interim measure and does not represent the Commission's final position on the points in question—especially insofar as intermodal tariff filings are concerned. Another rulemaking proceeding proposing definitions (and other matters) which more closely parallel the domestic commerce regulations served October 4, 1977 in Docket No. 76-40 (General Order 38, 46 CFR Part 531) is contemplated.

Petitioners' remaining contentions (Items 7, 10, 11 and 12, pp. 3-4, above) are rejected for the following reasons.

Item 7. Section 536.4(a)(1). Shipping Act section 18(b) requires precision in tariff preparation, content and filing to the greatest extent practical. The Commission is responsible for interpreting what is "practical" in light of current shipping conditions. In today's containerized, highly competitive shipping environment, the Commission's staff, port interests, competing carriers and shippers can all better conduct their business when tariffs list only the individual ports or points which actually receive regular service from the publishing car-

rier(s). ANAFC has failed to demonstrate any harm which would occur from requiring carriers to amend their tariffs upon the requisite statutory notice when they wish to call at additional ports in a port range they already serve, especially since the notice period may be shortened in appropriate cases by use of the special permission process.

Item 10. Section 536.4(b)(10)(v). This requirement has long been applicable to foreign commerce carriers as § 510.24(f) of the Commission's Freight Forwarder Rules (General Order 4). The 1975 Rules restate the General Order 4 requirement purely as an organizational improvement—in order that all tariff regulations might appear together in General Order 13. The challenged rule requires carriers to accurately *disclose* what they pay to ocean freight forwarders. It is beyond the scope of this proceeding to determine whether modifications should be made in the nature and extent of forwarder brokerage compensation that carriers are presently paying. ANAFC's broad, conclusory contention that 1975 § 536.4(b)(10)(v) is vague and ineffective should be presented in the form of a petition or complaint directed at specific aspects of General Order 4.

Item 11. Section 536.9(c). Sea-Land misconstrues the purpose of the regulation, which is to insure that tariffs contain a rule that complies with the free time requirements of the Commission's General Order 8 (46 CFR Part 526)—regardless of what these requirements are at any particular time. The fact that possible extensions of General Order 8 are under consideration in pending Docket No. 73-55 is therefore irrelevant to the instant proceeding.

Item 12. Section 536.5(1). The requirement that both contract and noncontract rates be published immediately adjacent to each individual tariff item to which they apply long precedes the 1975 Rules. Subsequent to the initiation of this proceeding, the Commission chose to temporarily suspend this existing requirement (Circular Letter 10-74), and, as a matter of policy, believes it desirable to briefly continue both the rule and the temporary suspension to gather further operating experience concerning the value of "Conversion Tables" as a means of establishing noncontract rates. Further rulemaking on this point is anticipated shortly.

Therefore, it is ordered, That the aforesaid "Replies to Petition for Reconsideration" are accepted for filing; and

It is further ordered, That the aforesaid "Petitions for Reconsideration" are denied; and

It is further ordered, That, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 14b, 15, 16, 17, 18(b), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 813a, 814, 815, 816, 817(b), 820 and 841a), the Commission's Foreign Commerce Tariff Rules (46 CFR Part 536; General Order 13) are amended as set forth in the attached Appendix; and

It is further ordered, That the aforesaid amendments shall take effect on January 1, 1978. New or reissued tariffs tendered for filing on or after January 1, 1978 shall be fully subject to the new regulations. Tariff *amendments* submitted on or after the effective date will, however, continue to be accepted in the same format as the tariff being amended until January 1, 1979. On or after the latter date, all tariff material employed by common carriers by water in the foreign commerce of the United States shall fully conform to the requirements of revised Part 536. Tariffs on file January 1, 1979 which do not meet the requirements of revised Part 536 shall be cancelled; and

It is further ordered, That any existing grants of special permission excusing compliance with foreign commerce tariff filing requirements beyond the aforesaid effective date of revised Part 536 shall continue according to their original terms until further action of the Commission.

By the Commission.

FRANCIS C. HURNEY,
Secretary.

46 CFR Part 536 is revised to read as follows:

Sec.

AUTHORITY: Secs. 14b, 15, 16, 17, 18(b), 21, 43 of the Shipping Act, 1916 (46 U.S.C. 813a, 814, 815, 816, 817(b), 820 and 841a). The reporting requirements contained in Part 536 have been approved by the U.S. General Accounting Office under Number B-180233 (RO226).

§ 536.0 Scope.

(a) These regulations govern the publication and filing of tariffs for the transportation of property performed by common carriers by water in the foreign commerce of the United States and by combinations of such carriers, including through transportation offered in conjunction with one or more common carriers not otherwise subject to the Shipping Act, 1916.

(b) Section 18(b) of the Shipping Act, requires carriers and conferences of such carriers to file with the Commission and keep open to public inspection, tariffs showing, with as much exactitude as practical, all rates and charges for transportation between U.S. and foreign ports and between points on any through route which is established. The regulations of this part implement the requirements of section 18(b) and of Shipping Act section 14b governing the use of "Dual Rate" or Merchant's Contracts by carriers. The tariff format and contents requirements of this Part 536 also reflect the Commission's responsibilities in identifying and preventing reasonable preference or prejudice, and unjust discrimination pursuant to Shipping Act sections 15, 16 and 17.

§ 536.1 Exemptions and exclusions.

(a) The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

(1) Transportation by vessels operated by the State of Alaska between Prince Rupert, Canada, and ports in southeastern Alaska; *Provided,* That all the following conditions are met: (i) Carriage of property is limited to vehicles; (ii) tolls levied for vehicles are based solely on space utilized rather than the weight or contents of the vehicle and are the same whether the vehicle is loaded or empty; (iii) the vessel operator does not move the vehicles on or off the ship; and (iv) the carrier does not participate in any joint rates establishing through routes or in any other type of agreement with any other carrier.

(2) Transportation of passengers, commercial buses carrying passengers, personal vehicles, and personal effects by vessels operated by the State of Alaska between Seattle, Washington and Prince Rupert, Canada; *Provided,* That such vehicles, and personal effects are the accompanying personal property of the passengers, and are not services transported for the purpose of sale.

(b) The following services are subject to continuing special permission authority to deviate from the 30 day notice requirement of Section 18(b) of the Act and the form and content requirements of this part:

(1) Transportation of U.S. Department of Defense cargo by American-flag carriers under terms and conditions negotiated and approved by the Military Sealift Command; *Provided,* That all the following conditions are met: (i) Exact copies of all carrier quotations or tenders (tenders) *accepted* by the Military Sealift Command (MSC) are filed with the Commission as soon as possible after they are approved by MSC, but on not less than one day's filing notice prior to the effective date thereof; (ii) all tenders are filed in triplicate, one copy of which is signed and maintained at the Commission's Washington Office for public inspection; (iii) a letter of transmittal accompanies the filing stating that the documents are submitted in accordance with the requirements of Shipping Act section 18(b) and this section; (iv) tenders submitted for filing are numbered by their respective carriers as part of a distinct tariff series, with each carrier's series to begin with the number "1" and run consecutively thereafter; (v) tenders which supersede a prior tender specifically cancel the prior tender by its

series number; (vi) amendments or supplements to tenders are also approved by MSC, are filed with the Commission upon not less than one day's filing notice, and contain an appropriate reference to the original tender being amended or supplemented.

(2) Transportation of military household goods and personal effects by nonvessel operating carriers when there is also a domestic movement in the United States; *Provided,* That supplements and/or revised pages for such transportation are filed upon at least one day's notice in the form routinely submitted to the Department of Defense, together with a specification of the port-to-port segment of the applicable through rates.

§ 536.2 Definitions

The following definitions of terms shall apply unless otherwise indicated by the context of this part.

(a) *Act.* The Shipping Act, 1916, as amended.

(b) *Carrier.* A common carrier by water in the foreign commerce of the United States (including nonvessel operating carriers as defined in § 510.21(d) of the Commission's rules), as defined in section 1 of the Act.

(c) *Class rates.* Rates applicable to all articles which have been grouped or "classified" together in a classification tariff or a classification section of a rate tariff.

(d) *Commodity rates.* Rates applying on a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

(e) *Conference.* An association of carriers permitted, pursuant to an agreement approved by the Commission under section 15 of the Act to discuss, establish and file rates and practices on behalf of its member lines.

(f) *Dual rates.* That system of rating established pursuant to section 14b of the Act, in which a carrier or conference is permitted to offer a lower rate to a shipper who has contracted to give all or a fixed portion of his patronage to such carrier or conference, and at the same time offer a higher rate shippers who are not signatory to such contracts.

(g) *Joint rates.* Rates or charges established by two or more carriers by transportation over the combined routes of such carriers between a port and a port, a profit and a point, or any combination thereof.

(h) *Local rates.* Rates or charges for transportation over the route of a single carrier (or any one carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

(i) *Open rate.* When a conference relinquishes or suspends its ratemaking authority, in whole or in part, over a specified commodity or commodities, thereby permitting each individual carrier member of the conference to fix its own rates on such commodity or commodities.

(j) *Open for public inspection.* The maintenance of a complete and current set of the tariffs used by a carrier, or to which it is a party, in each of its offices and those of its agent in any city where it transacts business involving such tariffs.

(k) *Person.* Includes individuals, firms, partnerships, associations, companies, corporations, joint stock associations, trustees, receivers, agents, assignees and personal representatives.

(l) *Proportional rates.* Rates or charges assessed by a carrier for transportation services, the application of which are conditioned upon a prior or subsequent movement.

(m) *Tariff.* A publication containing the actual rates, charges, classifications, rules, regulations, and practices of a carrier or conference of carriers for transportation by water. For the purposes of this part, the term "practice" refers to those usages, customs, or modes of operation which in anywise affect, determine or change the transportation rates, charges or services provided by a carrier, and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

(n) *Tariff filing.* Any tariff, or modification thereto, which is received by the Commission as filed pursuant to these rules.

§ 536.3 Filing of tariffs; general.

(a) As used in this part, the words "file", "filed", or "filing," when used with respect to the filing of tariffs with the Commission, shall mean actual receipt at the Commission's Washington, D.C. offices.

(b) Tariffs shall be published and filed by an officer or employee of the carrier, or if a conference tariff, by an officer or employee of the conference. In the alternative, publication and filing may be accomplished through an agent authorized to act for such carrier or conference by a specific written delegation of authority.

(1) A carrier or conference may delegate authority to a person, not an official or employee of such carrier or conference, for the purpose of issuing all its tariffs, or any particular tariff.

(2) Whenever there is a delegation of tariff issuing authority by a carrier or conference, there shall be filed with the Commission a written statement indicating the appointment of such agent and setting forth the exact limits of the agent's authority.

(c) No carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such carrier is a party, whether filed by such carrier or by an authorized agent. Neither shall any carrier publish and file any tariff or modification thereto which conflicts with any other tariff on file with the Commission and which names such carrier as a participant thereto.

(d) All tariffs published in a foreign language shall be accompanied by three true copies translated into the English language when submitted for filing.

(e) All tariff matter filed with the Commission, except temporary filings as permitted hereinafter in § 536.10(c)(1), shall be accompanied by a letter of transmittal which clearly identifies the tariff and pages involved. If the sender desires a receipt, a duplicate of such letter must be furnished together with a plain self-addressed envelope measuring approximately 4½ by 9¾ inches. The duplicate letter will be stamped with the date of receipt and mailed to the sender in the envelope provided. If a duplicate letter and self-addressed envelope are not submitted, a receipt will not be furnished.

(f) All tariff matter, including temporary filings by mail pursuant to § 536.10(c)(1), shall be filed in triplicate: *Provided, however,* That temporary filings made by telegraph or cable pursuant to § 536.10(c)(1) need not be submitted in triplicate.

(g) Tariff filings shall be addressed to:

Federal Maritime Commission, Washington, D.C. 20573.

(h) Each carrier shall keep open for public inspection all tariffs published by it or to which it is a party in the foreign commerce of the United States.

(i) Carrier participants in a conference tariff are not relieved from the necessity of complying with the Commission's regulations and the requirements of section 18(b) of the Act with regard to keeping tariffs open for public inspection.

(j) A carrier's obligation to file tariffs pursuant to section 18(b) of the Act and this part must be carried out as follows: (1) When the carrier is not a party to an approved agreement, by filing its own tariff or tariffs; and (2) when the carrier is a party to an approved agreement, by participation in a single tariff filed by the conference. No common carrier may be shown as a participant in a tariff filed by another carrier or conference where such participation has not been approved by the Commission pursuant to section 15 of the Act, filed with the Commission pursuant to Part 524 of this Chapter, or filed with the Commission pursuant to § 536.8(b).

(k) When a carrier is admitted to membership in a conference, cancellation of the carrier's individual tariff (if any) in the trade served by the conference (see § 530.7 of this chapter), and revision of the participating carrier page of the conference tariff (naming the newly admitted carrier) shall be published and filed with the Commission and may become effective upon the date of such filing. *Provided,* that, if the carrier has an individual tariff in the trade served by the conference and cancellation of that tariff and revision of the participating carrier page of the conference tariff (naming the newly admitted carrier) would result in an increase in that carrier's rates, the carrier shall, 30 days prior to being admitted as a new conference member, cancel its individual tariff effective 30 days from date of publication, making reference to the conference tariff and where it may be examined, unless special permission to become effective in less than 30 days has

been granted by the Commission pursuant to § 536.15.

(l) Any tariff submitted for filing which fails to conform with sections 14b or 18(b) of the Act, or with the provisions of this part, is subject to rejection by the Commission and, upon rejection shall be void and its use unlawful. Rejection will be accomplished as set forth in § 536.10(d)(1).

(m) Copies of all tariffs on file with the Commission (including all subsequent revisions and changes thereto) shall be made available by carriers and conferences to any person. A reasonable charge may be made for this service.

(n) Any new or initial tariffs shall be published and filed to become effective not earlier than 30 days after publication and filing, unless special permission to become effective on less than said 30 days' notice has been granted by the Commission pursuant to § 536.15.

(o) Provisions applicable to tariffs containing rates, charges, rules and regulations for through intermodal transportation are set forth in § 536.8; they are additional requirements for use only in such circumstances and are not a substitute for any other requirements of this part.

§ 536.4 Tariff format.

(a) All tariffs which are filed and kept open to public inspection shall be clear and legible and shall be plainly printed, mimeographed, multilithed, or prepared by some other similar permanent process on durable paper of good quality.

(b) No alteration in writing or erasure shall be made in any tariff publication.

(c) Sufficient marginal space or not less than three-fourths of an inch shall be allowed at the left side of each tariff page to permit insertion in tariff binders. In addition, a margin of not less than one-half inch shall be allowed at the bottom of each tariff page for insertion of the Commission's receipt stamp.

(d) Tariffs shall be in looseleaf form and printed on pages approximately 8½ by 11 inches. If other than a looseleaf tariff is to be filed, application for permission to make such filing shall be made to the Commission. If permission to file other than a looseleaf tariff is granted by the Commission, such permission will set forth the form and manner of filing the tariff and any amendments or supplements thereto.

(e) Tariff pages shall be printed on one side only, and each page after the title page shall be numbered in the upper right-hand corner. Each tariff page must show the name of the carrier or conference for whose account the tariff is issued, the effective date, the page number, the FMC number of the tariff, etc., as illustrated by Exhibit No. 1.

(f) To the extent applicable, all tariffs filed pursuant to this part shall be arranged in the following order:

Title Page. Check Sheet. Table of Contents. Participating Carrier Page. Surcharge and/or Arbitrary/Differential/Outport Differential (or other identifying term) Section. Rules and Regulations Section. Index of Commodities and Classifications. Commodity Rate Section. Classification and Class Rate Section. Routing Section. Open Rate Section.

§ 536.5 Tariff contents.

(a) The first page of every tariff shall be a title page and shall be printed on paper heavier than that used in the body of the tariff. The title page shall contain the following information:

(1) The name of the carrier, appropriately identified as a Nonvessel Operating Common Carrier (NVOCC) or a Vessel Operating Common Carrier (VOCC), or the name of the conference. Tariffs filed pursuant to an agreement approved under section 15 of the Act shall be further identified with the agreement number.

(2) An FMC tariff number assigned by the carrier or conference. For example:

Smith Line Tariff FMC–1.

The first tariff filed by a carrier or conference pursuant to this or any prior regulation shall be assigned the number FMC–1. Each tariff thereafter issued by the carrier or conference shall be assigned the next, consecutive FMC number. Beneath the FMC tariff number shall be shown the number or numbers of any FMC tariff or tariffs cancelled by the issuance of such tariff. For example:

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–5 and Smith Line Tariff FMC–9.

or

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–12.

(3) When an individual carrier, partnership or joint service operates under a trade name, the legal name or names of each individual carrier shall be shown as well as the trade name. Alternatively, reference may be made to an internal tariff page where this information is shown.

(4)(i) A list of the ports covered by the tariff, or reference to an internal tariff page where such ports are listed. In lieu of such listing of ports, a statement of the range of ports served will be accepted; *Provided,* That any exclusion of a port within the range or any restriction applying at a port within the range is specifically stated.

(ii) Whenever tariff application is shown by identification of a range of ports in lieu of listing individual ports, such range of ports must be within a geographical area generally served by the carrier(s) participating in the tariff.

(5) A statement showing the type of service offered by the carrier(s), e.g., direct service, transshipment, etc. When transshipment service is indicated, reference shall be made to the page in the tariff describing such service (see § 536.5(d)(13)).

(6) A statement showing the type of rates contained in the tariff. For example: Local, proportional, class, commodity, overland common point, joint, through, intermodal, etc.

(7) A reference to other publications which in any manner govern the tariff. Alternatively, reference may be made on the title page to an internal page identifying such governing publications, as prescribed in § 536.5(c)(8).

(8) The date on which the tariff will become effective. Every tariff in which any provision is to become effective upon a date different from the general effective date of such tariff shall so indicate in substantially the following form:

Effective: _____ (except as otherwise herein provided) or (except as provided in Item No. _____) or (except as provided on page _____).

(9) The name, title, and address of the person issuing the tariff, or if the carrier or conference has appointed a tariff filing agent pursuant to § 536.3(b), the name, title and address of the agent making such filing.

(10) An expiration date, if the entire tariff publication is to expire on a specified date.

(11) The names of all participating carriers in the tariff, if more than one such carrier participates. Alternatively, reference may be made to an internal page on which are listed the names of all participating carriers (see §§ 536.5(c)(2) and (3)).

(12) The subscription price of the tariff (and any major components thereof offered separately), or a statement that the entire tariff will be furnished without charge, accompanied by a reference to a tariff rule which clearly states where subscriptions may be obtained and the materials which will be furnished to subscribers.

(b) All pages after the title page shall be numbered beginning with "Original Page 1," "Original Page 2," etc. Each page as thereafter revised shall be a consecutively numbered revision of the same page in the form required by § 536.10(b). For example:

The 7th page in a tariff as originally filed would be titled "Original Page 7." The first revision of this page would be titled "First Revised Page 7, cancels original page 7."

(c) The body of the tariff shall contain the following:

(1) A table of contents containing a full and complete statement of the exact locations where information in the tariff will be found. Such statement shall list all subjects in alphabetical order and shall show the page number and number of the item, rule or unit where such subject will be found.

(2) The full legal name of each participating carrier, appropriately identified as a Nonvessel Operating Common Carrier (NVOCC) or Vessel Operating Common Carrier (VOCC), and the address of its principal office. Where a joint service participates, the FMC number of the agreement authorizing the joint service shall also be shown.

(3) All trade names, if any, under which service will be provided, and the names of the carrier or carriers operating under each such trade name, if not shown on the title page.

(4) A list of the ports or range of ports to and from which the tariff rates apply, if not shown on the title page, in conformity with § 536.5(a)(4).

(5) A statement indicating the extent of any limitation or restriction, if the application of any of the rates, charges, rules, or regulations stated in the tariff

are restricted to any particular port, pier, etc., or otherwise limited.

(6) A single, complete, alphabetically arranged index listing all commodities for which the tariff names ratse, together with a reference to each item or page where a particular article is shown. If a rate item embraces two (2) or more commodities, each commodity shall be shown in the index. Class rate tariffs and tariffs containing both class and commodity rates shall contain, in addition to applicable item or page references, the ratings of commodities to which class rates apply (see Exhibit No. 6). Such index may be omitted where rates on less than 100 commodities are included in the tariff. All articles generic to different species of the same commodity should be grouped together. For example:

Paper, building; paper, printing; paper, wrapping.

(7) A full explanation of any symbols, reference marks, or abbreviations used in the tariff. If such explanation does not appear on the page where the reference marks or symbols are used, such page shall refer to the page in the tariff where the explanation is given. The symbols shown in § 536.10(b)(2) shall be used only for the purposes indicated therein.

(8) If governed in any manner by other publications, as may be permitted herein, a reference thereto substantially in the following form:

This tariff is governed, except as otherwise provided herein by Bill of Lading Tariff FMC No. _____ (or by Rules Tariff No. _____), etc.

Where such reference is fully made on the title page, reference elsewhere in the tariff is unnecessary. Governing publications must be on file with the Federal Maritime Commission.

(9) All rates applicable to the transportation of the articles or classes of articles named in the tariff. Rates shall be stated as required by § 536.6.

(10) Rules and regulations which in anywise affect the application of the tariff.

(d) Specific tariff rules shall be published to govern each of the following subjects and shall be designated in all tariffs by the numbers specified below:

(1) *Scope.* See § 536.5(c)(4).

(2) *Application of rates.* A clear statement of all the services provided to the shipper and included in the transportation rates set forth therein.

(3) *Rate applicability rule.* A clear and definite statement of the time at which a rate becomes applicable to any given shipment.

(4) *Heavy lift.*

(5) *Extra length.*

(6) *Minimum bill of lading charge(s).*

(7) *Payment of freight charges.* A clear statement of all requirements for the payment of freight charges. Currency restrictions, if any, must be specified and the basis for determining the rates of currency exchange must be set forth. If credit is extended to shippers, the rule must include the credit terms available and the conditions upon which credit is extended. When credit applications or agreements are required, specimens of such applications or agreements shall be published as part of this rule.

(8) *Specimen Bill(s) of Lading.* Specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement applicable to the service offered, unless a separate bill of lading tariff is on file as permitted by § 536.13(a). Such documents shall not contain provisions inconsistent or in conflict with the rules and regulations published in any applicable tariff

Every tariff shall also contain the following numbered rules, whenever they apply to the service offered:

(9) *Freight forwarder compensation.* A statement describing the rate or rates of compensation to be paid to licensed ocean freight forwarders on United States export shipments in accordance with § 510.24(f) of the Commission's rules.

(10) *Application of surcharge and/or arbitraries/differentials/outport differentials or other identifying term).* Tariffs imposing upon the same shipment, more than one surcharge and/or arbitrary, expressed in percentage terms, shall also clearly state the manner in which the percentages shall be applied in computing the additional charges.

(11) *Minimum quantity rates.* Tariffs naming two or more rates for different quantities of commodities covered by the same description, shall also state:

When two or more freight rates are named for carriage of goods of the same description over the same route and under similar conditions and the application is dependent upon the quantity of the goods shipped, the total freight charges assessed against the shipment shall not exceed the total charges computed for a larger quantity: *Provided, however,* That the rate noted alongside a qualification specifying a required minimum quantity, either weight or measurement per container or in containers, will be applicable to the contents of the container(s): *Provided,* The minimum set forth is met or exceeded. At the shipper's option, a quantity less than the minimum level may be freighted at the lower rate: *Provided,* The weight or measurement declared for rating purposes is increased to the minimum level.

(12) *Ad Volorem rates.* A statement specifying the exact method of computing the charge, e.g., shipper's declaration, invoice value, delivered value, etc., and the additional liability, if any, assumed by the carrier in consideration therefor.

(13) *Transshipment service.* Tariffs containing through rate for transshipment service offered under either nonexclusive agreements filed in compliance with Part 524 of the Commission's rules or agreements approved by the Commission under section 15 of the Act, shall also contain a Routing Section as illustrated by Exhibit No. 8 which includes: (i) A clear and thorough description of the routings employed (origin, transshipment and destination ports), additional charges levied, if any (i.e., port arbitrary and/or additional transshipment charges), and the participating carriers (originating, delivering and/or intermediate; and (ii) a statement reading substantially as follows:

The rules, regulations and rates apply to all transshipment arrangements between the participating carriers. Participating carriers have agreed to observe the rules, regulations, rates and routings established herein as evidenced by the agreement on file with the Commission.

(14) *Application of contract rate system.* A clear and complete explanation of the contract rate system, including a true copy of the approved contract.

(15) *Open rates.* A clear and complete explanation of the extent to which conference rates have been opened pursuant to §§ 536.6 (n) and (o). Any restriction or limitation on the right of participating carriers to fix their own rate items, and the extent to which applicable rules and regulations of the conference tariff will continue to govern the rates filed by each individual line, shall also be stated.

(16) *Explosives or other dangerous articles.* A clear statement of all regulations governing the transportation of explosives, inflammable or corrosive material, or other dangerous articles, or a reference to a separate publication which contains such regulations.

(17) *Green salted hides.* A rule in accordance with Part 534 of the Commission's rules which requires that: (i) The shipping weight for purposes of assessing transportation charges be either a scale weight or a scale weight minus a deduction whose amount and method of computation are specified in said rule; and (ii) the shipper furnishes the carrier a weighing certificate or dock receipt from an inland carrier for each shipment of green salted hides at or before the time the shipment is tendered for ocean shipment.

(18) *Returned cargo.* Tariffs offering the return shipment of refused, damaged or rejected shipments, or exhibits at trade fairs, shows, or expositions, to port of origin at the rates assessed on the original movement when such rates are lower than prevailing rates, shall also provide that:

(i) The return of shipments be accomplished within a specific period not to exceed one year;

(ii) The return movement be made over the line of the same carrier performing the original movement: *Provided,* That in the case of a conference tariff, return may be made by any member line when the original shipment was carried by a conference member under the conference tariff.

(iii) A copy of the original bill of lading showing the rate assessed be surrendered to the return carrier.

(19) *Shippers requests and complaints.* Clear and complete instructions in accordance with § 526.6 of the Commission's rules stating where and by what method shippers may file their requests and complaints, together with a sample of the rate request form if one is used, or, in lieu thereof, a description of the information necessary for processing the request or complaint.

(e) Additional rules which affect the application of the tariff shall immediately follow the rules specified above and shall be numbered consecutively, commencing with number 20.

(f) Where a tariff rule affects only particular items or rates, the affected items or rates shall specifically refer to such rule.

(g) No rate tariff shall require reference to any other rate tariff for determination of any applicable rate: *Provided, however,* That:

(1) Reference may be made to another tariff for terminal and accessorial charges;

(2) Returned cargo rates accompanied by the rule specified in § 536.5(d)(18) are permitted;

(3) Reference may be made to another tariff (not containing rates) for commodity lists or generic descriptions as provided in §§ 536.6 (f) and (g); and

(4) Reference may be made to another tariff (not containing rates) covering (i) explosives, inflammable or corrosive materials, or other dangerous articles; (ii) bills of lading or contracts of affreightment; (iii) commodity classifications; and (iv) routing guides or other similar tariffs as provided in § 536.13.

§ 536.6 Statement of rates and charges.

(a) The application of all rates shall be clear and definite and explicitly stated per 100 pounds, per cubic foot, per ton of 2,000 pounds, per ton of 2,240 pounds, or some other expressly defined unit.

(b) All rates shall be stated in a simple and systematic manner. Commodities and generic commodity groupings on which rates are stated shall be listed in alphabetical order. If published in the index, item numbers shall also be shown in the body of the tariff.

(c) Where rates are stated in amounts per package, the method of packing and specifications showing size, measurement or weight of the packages on which such rates apply shall be shown.

(d) Where rates vary depending upon whether cargo is packed, crated, palletized, bundled, strapped, loose or otherwise prepared or delivered for shipment, there shall be a statement clearly and specifically governing the application of such rates. See Exhibit No. 2.

(e) Where rates to or from designated ports are determined by the adding or subtracting of arbitraries or differentials to or from rates applicable at other ports, such application shall be clearly shown.

(f) A commodity item may, by use of a generic term, provide rates on a number of articles: *Provided,* That such term contains reference to an item in the tariff which clearly defines the type of commodities contained in such generic term or which contains a complete list of such articles, or contains a reference to the FMC number of a separate tariff of the same carrier or conference containing such definition or list of such articles.

Example: Packinghouse products, as described in Item ____; or packinghouse products as described under heading "Packinghouse products" in FMC No. ____, or successive issues thereof.

(g) A separate tariff, not containing rates, may be filed by a carrier or conference showing a list of the commodities on which rates published by reference to generic terms will apply, and rate tariffs shall be made subject thereto as provided in paragraph (f) of this section.

(h) When commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles.

(i) The rate section of a tariff may include a rate applicable to all commodities, or all commodities of a class, on which specific commodity rates are not stated in the tariff, to be called "cargo, n.o.s." (not otherwise specified), "general cargo", or other identifying name, or by broad generic heading such as "chemicals, n.o.s."

(j) A separate tariff naming rates on a group of related commodities may be published: *Provided, however,* That such tariff shall contain all of the rates applicable to such commodities, which are published by the same carrier or conference, to or from the same ports or points. When such tariffs are published, reference shall be made thereto in the tariff of general application for the same carrier or conference, to or from the same ports or points.

(k) Publication of rates which duplicate or conflict with the rates published in the same or any other tariff is forbidden, and, except as otherwise authorized by this part, the publication of a statement in a tariff to the effect that the rates published therein take precedence over the rates published in some other tariff, or that the rates published in some other tariff take precedence over or alternate with rates published therein, is prohibited: *Provided, however,* That where a carrier or conference publishes both commodity and class rates, a statement shall be published in the tariff clearly indicating which of the two rates shall apply on the commodity or commodities on which both class rates and commodity rates are published; or where alternate rates or charges are permitted pursuant to § 536.5(g).

(l) Where a conference or carrier uses a dual rate system approved by the Commission and states in its tariffs two rates pursuant to such system, each commodity item in the tariff subject to duel rates shall indicate such "Contract Rates" and "Noncontract Rates" as illustrated by Exhibit Nos. 3 through 7.

(m) Where a conference opens any or all rates, each tariff item so opened shall be amended to indicate the word "open" in place of the previously stated rates, and shall indicate a reference to a published rule in the tariff clearly defining the word "open" as used in each tariff and indicates where the rates of the individual conference member lines on such items will be found.

(n) Where a conference opens rates pursuant to paragraph (m) of this section, an individual conference member shall not charge rates on such an item unless and until the individual member files a proper tariff rate covering such item as required by these rules. This may be accomplished by the individual carrier (or its tariff agent) filing a complete tariff pursuant to this part, or by the conference (or its tariff agent) filing a separate supplement at the end of the conference tariff indicating the rates which will be charged by each individual carrier and the governing rules and provisions of the conference tariff applicable to each carrier. Separate open rate tariffs may also be published by a conference (or its tariff agent). When conference members publish their open rates in a separate tariff, such tariffs must reference, on the title page, the conference tariff in which the open rated condition is reflected.

(o) Temporary, special or emergency rates, or rates conditioned upon an expiration date or other factor, shall be shown under the same commodity item, generic heading, or class, in the same place in the tariff, as the ordinarily applicable rates. See Exhibit No. 5.

(1) If only a portion of particular rates or other provisions will expire with a special date, a notation to that effect shall clearly be shown in connection with such items as indicated in Exhibit No. 2.

(2) Project rates may be placed in a special section of the tariff: *Provided, however,* That the Table of Contents or Commodity Index contains a specific reference to "Project Rates."

(p) All rate pages shall be filed in the form and manner shown in Exhibit Nos. 1 through 7. Where space permits, contract and noncontract rates, properly identified, may be shown in column form (side-by-side) rather than the manner shown in Exhibit No. 3.

(q) The number of rate columns may be varied as required to state rates to one or more ports, port groupings or port ranges. The width of all columns in the rate block section of tariff rate pages may be varied as required.

§ 536.7 [Reserved]

§ 536.8 Tariffs containing through rates and through routes.

(a) *Definitions.* The following definitions shall apply for purposes of this section.

(1) *Through route.* An arrangement for the continuous carriage of goods between points of origin and destination, either or both of which lie beyond port terminal areas;

(2) *Through rate.* A rate expressed as a single number representing the charge to the shipper by a carrier or carriers holding out to provide transportation over a through route;

(3) *Joint rate.* A through rate in which two or more carriers participate by

agreement for the offering of through transportation service over a through route.

(4) *Participating carrier.* Any carrier holding out to perform a transportation service over a through route.

(b) *Filing requirements.* Every carrier or conference shall file tariffs stating all through rates, charges, rules, and regulations governing the through transportation of freight between ports or points in the United States and ports or points in a foreign country in which such carrier or conference participates. Such tariffs shall include the names of all participating common carriers, the established through route, a description of the service to be performed by each participating common carrier, and clearly indicate the division, rate or charge to be collected by the water carrier subject to the Act for its port-to-port portion of the through service, which division, rate or charge shall be treated as a proportional rate subject to the provisions of the Act. Such tariffs will be filed and maintained in the manner provided in section 18(b) of the Act, and the rules of this part. A memorandum of every arrangement to which a carrier subject to the Act, or conference of such carriers, is or becomes a party, for transportation between a port or point in the United States and a port or point in a foreign country, establishing any joint rate which is offered in connection with any common carrier, shall be filed concurrently with the filing of the through rate tariffs.[1]

§ 536.9 Terminal rules, charges and allowances; free time allowed at New York.

(a) Every tariff filed pursuant to this part shall state separately all terminal or other charges, privileges, or facilities under the control of the carrier or conference which are granted or allowed to shippers.

(b) Wherever a tariff includes charges for terminal services, canal tolls, or additional charges not under the control of the carrier or conference, which merely acts as a collection agent for the charges, and the agency making such charges to the carrier increases the charges without notice to the carrier or conference, such charges may be increased in the carrier or conference tariff without being subject to the 30 day advance filing requirement of this part or separately stated on the bill of lading.

(c) Every tariff naming rates on import traffic shipped through the port of New York, or to a range of ports which includes New York, shall contain a rule in the compliance with Part 526 of the Commission's rules (General Order 8).

(d) Every tariff naming rates on export traffic shipped through the port of New York or the port of Philadelphia, or through a range of ports which includes either of those ports, shall contain a rule in compliance with Part 541 of the Commission's rules (General Order 26).

§ 536.10 Amendments to tariffs.

(a) *General tariff amendments.* (1) All changes in, additions to, or deletions from a tariff shall be known as amendments. All tariff amendments shall be in permanent form as set forth hereafter.

(2) Amendments which provide for new or initial rates, or amendments which provide for changes in rates, charges, rules, or other provisions resulting in an increase in cost to the shipper shall be published and filed to become effective not earlier than 30 days after the date of publication and filing, unless special permission to become effective on less than said 30 days' notice has been granted by the Commission pursuant to § 536.15. Amendments to tariffs containing contract rates which result in an increase in cost to the shipper shall be published and filed to become effective not earlier than 90 days after giving notice to contract shippers by filing the amendments with the Commission, except as otherwise provided in the approved Merchant's Contract.

(3) Amendments which provide for changes in rates, charges, rules, regulations, or other provisions resulting in a decrease in cost to the shipper, or amendments which result in no change in cost to the shipper may become effective upon publication and filing.

(4) An amendment containing a rate on a specific commodity not previously named in a tariff which is a reduction or no change in cost to the shipper may become effective upon publication and filing: *Provided, however,* That (i) the tariff contains a "cargo, n.o.s.," or similar general cargo rate which would otherwise be applicable to the specific commodity, and (ii) the specific commodity rate is equal to or lower than the previously applicable general cargo rate.

(5) An amendment which deletes a specific commodity and rate applicable thereto from a tariff, thereby resulting in the application of a higher "cargo, n.o.s.," or similar general cargo rate, is a rate increase and shall be published and filed to become effective not earlier than 30 days after the date of filing in the absence of special permission for an earlier effective date pursuant to § 536.15.

(b) *Permanent tariff amendments.* (1) Looseleaf tariffs shall be amended by reprinting the entire page upon which any modification is made. An amended tariff page shall be designated in the upper right-hand corner as a "revised page" in the manner illustrated by Exhibit Nos. 1 through 7. For example:

First revised page 1, or
First revised page 21.

(2) The revised page filed to accomplish a tariff amendment shall reprint the page to be replaced in its entirety, changing only the matter on the page which is modified. Changes in existing rates, charges, classifications, rules, or other provisions accomplished by an amendment shall be indicated on the revised page by the following uniform symbols:

(R) To denote a reduction.
(A) To denote an increase.
(C) To denote changes in wording which result in neither an increase nor a decrease in charges.
(D) To denote a deletion.
(E) To denote an exception to a general change.
(N) To denote reissued matter.
(I) To denote new or initail matter.

An explanation of such symbols shall be set forth in the tariff as required by § 536.5(c)(7).

(3) Each revised tariff page shall cancel the previously issued page upon which a change is made. The previous page being cancelled shall be indicated immediately under the designation of the new revised page number as illustrated by Exhibit Nos. 1 through 7. For example:

First revised page 1 cancels original page 1 or;
Fifth revised page 21 cancels fourth revised page 21.

All matter on this cancelled page which is not being changed shall be reissued on the revised page as it appeared on the page being cancelled.

(4) Each revised page shall, in the upper right-hand corner, state the effective date of the changes made on that page. Such effective date shall be subject to the requirements of section 18(b) of the Act and of this section. Revised pages may also state the issue date.

(5) When a revised page cancelling a previous page deletes any matter contained in the previous page, the deletion shall be indicated by the symbol (D) and any other § 536.10(b)(2) symbol applicable to the effect of the deletion upon the carrier's rates or charges.

(6) Every tariff amendment effective upon less than statutory notice pursuant to special permission granted by the Commission, shall show in connection with such change the notation required by § 536.15(f).

(7) Increased rates brought forward from a previously filed page prior to their effective date, shall be designated with the symbol (N) as "reissued" and state their original effective date.

(8) If, on account of expansion of matter on any page, it becomes necessary to add an additional page in order to accommodate said new matter, such additional page (except when it follows the final page) shall be given the same number as the previous page with a letter suffix unless all subsequent pages are reissued and renumbered. For example:

Original page 4–A, Original Page 4–B, etc. If it is necessary to change matter on Original page 4–A, it may be done by issuing First Revised Page 4–A, which shall indicate the cancellation of Original Page 4–A.

(9) When a revised page deletes rates, rules or other provisions previously published on the page which it cancels, and such rates, rules, or provisions are published on a different page, the revised page shall make a specific reference to the page on which the rates, rules, or

[1] Arrangements subject to section 15 of the Act must also be filed and approved in accordance with the requirements of General Order 24 (Part 522 of the Commission's rules).

provisions will be found, and the page to which reference is made shall contain the following notation in connection with such rates, rules or other provisions;

For (here insert rates, rules, or other provisions in question) in effect prior to the effective date hereof see page ---------.

Subsequently revised pages of the same number shall omit this notation insofar as this particular tariff matter is concerned.

(10) The following method shall be used in identifying and checking revised pages:

(i) When the original tariff is filed, the page following the title page shall be designated a "check sheet."

(ii) The check sheet shall contain correction numbers which shall be in consecutive numerical order beginning with number one (1), with a blank space provided with each correction number. A correction number shall be placed in the upper right-hand corner of each revised page. This procedure will provide a cross reference and a permanent record of all corrections made to the tariff.

(c) *Temporary tariff amendment.* In order to facilitate the filing of rate changes as quickly as possible, without the delay necessitated by preparation and filing of permanent revised pages as required above, temporary filings by telegram, cable, or mail (in the form of letters, rate circulars, etc.), will be permitted, subject to the following conditions:

(1) The information received is clear and legible and contains the following information:

(i) The legal and operating name of the carrier or conference;

(ii) The FMC number and description of the tariff being amended;

(iii) An exact description of the commodities upon which rates are being changed;

(iv) The number of the previously issued page upon which the item being changed is located;

(v) The new rate being implemented;

(vi) The effective date of the rate change;

(vii) A statement identifying the change as a rate increase, decrease, or initial filing.

(2) If the temporary filing is pursuant to special permission authority already granted, reference must be made to the special permission number.

(3) Temporary amendments accepted for filing cannot be withdrawn or rescinded in any manner.

(4) Any carrier or conference making a temporary filing shall at the same time furnish all subscribers to the tariff all the information furnished to the Commission pursuant to § 536.10(c)(1).

(5) All temporary filings shall be followed by the filing of a permanent revised page covering the same tariff changes which fully complies with § 536.10(b). Such permanent filing shall state the method by which the temporary filing was submitted (letter, telegram, rate advice, etc.) and the date it was submitted. Such permanent amendments must be filed within twenty (20) days after receipt of the temporary filing for carriers or conferences making such filing from within the continental United States, and within thirty (30) days after receipt of the temporary filing when the carrier or conference is located outside the continental United States.

(6) A permanent filing is unnecessary where a temporary filing is rejected; however, all tariff subscribers must be notified that the temporary filing has been rejected.

(7) In the event a carrier or conference filing a temporary tariff amendment does not file a permanent tariff amendment within the time period and in the manner prescribed in § 536.10(c)(6), a warning letter or collect telegram shall be sent by the Commission to such carrier or conference. Immediate steps shall be taken by the carrier or conference to correct the deficiency. If a carrier or conference fails to submit the proper permanent filing after one warning, or, after having once received a written warning, should subsequently fail a second time to file a permanent tariff modification within the prescribed time period, the Commission shall notify such carrier or conference that it no longer has the privilege of making rate changes by temporary filing. Thereafter, said carrier or conference shall amend its tariff only by filing permanent amendments until further notice of the Commission.

(d) *Rejection of tariff amendments or other tariff publications.* (1) Any amendment (or other tariff publication) submitted for filing which fails in any respect to conform with sections 18(b) and 14b of the Act, or with the provisions of this part, is subject to rejection. When tariff matter is rejected, the Commission, acting through a designated official, will inform the person tendering the material for filing of the rejection by telegram, cablegram, or letter.

(i) Upon receipt of notice of a rejection, the filing party shall immediately remove such rejected material from its effective tariff and immediately notify all subscribers to affected tariffs that the rejected material is void.

(ii) The number assigned to an amendment (or other tariff publication) which has been rejected may not be used again. The rejected material may not be referred to in any subsequent amendment (or other tariff publication) in any manner whatsoever, except that a notation shall appear at the bottom of any new tariff matter issued to replace rejected matter which reads substantially as follows:

Issued in lieu of ---- Page No. ---- (Correction No. ----) rejected by the Federal Maritime Commission.

(2) Any amendment (or other tariff publication) submitted for filing which contains more than one change, one or more, but not all, of which fails to conform with sections 18(b) or 14b of the Act, or with the provisions of this part, is subject to partial rejection. When tariff matter is partially rejected, the Commission, acting through a designated official, will inform the person tendering the material for filing of the partial rejection by telegram, cablegram, or letter.

(i) Upon receiving notice of a partial rejection, the filing party shall immediately notify all subscribers to affected tariffs of the partial rejection and file a revised amendment (or other tariff publication) deleting the partially rejected matter or otherwise conforming such matter to the applicable provisions of the Act or this part.

(ii) The number assigned to an amendment (or other tariff publication) which has been rejected in part may not be used again. Revised tariff matter issued following a partial rejection shall also bear the notation prescribed in § 536.10(d)(1)(ii).

§ 536.11 Supplements to tariffs.

(a) Supplements to tariffs may be filed only to accomplish the following:

(1) To cancel a tariff in whole or in part.

(2) To provide for a general rate decrease applicable to all, or substantially all, the commodities listed in a tariff.

(3) To provide for a general rate increase applicable to all, or substantially all, the commodities listed in a tariff.

(4) To indicate seasonable discontinuance or temporary suspension or reinstitution of service covered by a tariff.

(5) To provide for change in name of the publishing carrier or its tariff agent.

(b) Supplements filed pursuant to §§ 536.11(a)(2) and 536.11(a)(3) which do not change the rates applicable to *all* listed commodities shall bear one of the following notations:

(1) The general rate increase/decrease provided for on this page applies to all commodities stated herein except the following: (here list the excepted commodities or commodity item numbers); or

(2) The general rate increase/decrease provided for on this page applies to all commodities stated herein except those noted on page ----.

(c) General rate change supplements (paragraphs (a)(2) and (3) of this section) shall bear an expiration date that coincides with the date the changes will be reflected in the rates and charges in the tariff. Such date shall not be more than 90 days after the date of filing. No more than one such supplement may be in effect at any time.

(d) Additional supplements to other than looseleaf tariffs shall be filed as provided by any special permission authority granted by the Commission pursuant to §§ 536.4(d) and 536.15.

(e) Supplements shall be numbered consecutively on the upper right-hand corner of each page. For example:

Supplement No. 1 to FMC Tariff No. ----

§ 536.12 [Reserved]

§ 536.13 Governing tariffs.

(a) If it is undesirable or impractical to include tariff rules or bills of lading/contracts of affreightment in a rate tariff as required by §§ 536.5(c)(10) and 536.5(d)(8), such materials may be separately published and filed as a "rules tariff" and/or "bill of lading tariff." Classifications of freight, routing guides, and similar tariff matter may also be published and filed as separate "governing tariffs." Rate tariffs affected by such governing publications shall be made expressly sub-

ject thereto by the inclusion of a reference in substantially the following form:

Except as otherwise provided, this tariff is governed by, (insert type of tariff), FMC No. ____

(b) No rate tariff shall refer to or be governed by another rate tariff.

(c) Tariffs naming rates for the transportation of explosives, inflammable or corrosive material, or other dangerous articles, shall contain, as required by § 536.5(d)(16), the rules and regulations issued by the carrier or conference governing the transportation of such articles, or reference to a separate publication where such regulations are available to the general public.

§ 536.14 Transfer of operations, transfer of control, changes in carrier name, and changes in conference membership.

(a) Whenever a carrier with an individual tariff on file changes its name, or transfers operating control transferred to another person, the person which will thereafter operate the common carrier service shall make appropriate tariff filings to indicate the change in name. Subsequent amendments to such tariffs shall be in the name of the new carrier.

(b) Whenever the name of a carrier which participates in a conference is changed, the conference shall file an appropriate amendment to its tariff indicating the participating carrier's new name.

§ 536.15 Applications for special permission.

(a) Section 18(b) of the Act authorizes the Commission, in its discretion and for good cause shown, to permit increases in rates or the issuance of new or initial rates on less than statutory notice. The Commission may also in its discretion and for good cause shown, permit departures from the regulations of this part. The Commission will grant such permission only in cases where real merit is demonstrated.

(1) Typographical and/or clerical errors constitute good cause for the exercise of special permission authority, but every application based thereon must plainly specify the error and present clear evidence of its existence, together with a full statement of the attending circumstances, and shall be filed with reasonable promptness after issuance of the defective tariff publication.

(b) Application for special permission to establish rate increases on less than statutory notice, or for waiver of the provisions of this part, shall be made by the carrier, conference, or agent that holds authorization to file the tariff publication.

(c) Application for special permission shall be made only by cable, telegram or carrier in whose name the special permission is requested.

letter: *Provided, however,* That in emergency situations, application may be made by telephone if the telephone communication is promptly followed by a cable, telephone, or letter.

(d) If the authority granted by special permission is used, it must be used in its entirety and in the manner set forth by the Commission. If it is not desired to use the exact authority granted, and less, more or different authority is desired, a new application complying with the requirements of this part in all respects and referring to the previous special permission must be filed.

(e) Applications for special permission shall contain the following information:

(1) The name of the conference or

(2) The FMC number and description of the specific tariff involved.

(3) The rate, commodity, rules, etc., (related to the application), and the special circumstances which the applicant believes to constitute good cause to make a tariff change upon less than the statutory notice period.

(f) Every tariff filed pursuant to a special permission granted by the Commission shall contain the following notation:

Issued under authority of Federal Maritime Commission Special Permission No. F-----[2]

[2] The filing carrier(s) shall fill in the blank with the special permission number assigned by the Commission.

EXHIBIT No. 1

Name of carrier or conference and tariff number.		Orig./Rev.	Page
		Cancels	Page
		Effective date	
From: (Range or ports)	To: (Range or ports)		
		Correction	

Except as otherwise provided herein, rates apply per ton of .....or.....cubic....., whichever produces the greater revenue.		Type [1]	Rate basis	1	2	Item [1]
Commodity code	Commodity description and packaging					
	Explanation for use of this exhibit: All tariff pages, except the title page, shall be filed in the form and manner as prescribed above the rate block on this page.					

[1] As applicable.

EXHIBIT No. 2

Name of carrier or conference and tariff number		Orig./Rev.	Page
		Cancels	Page
		Effective date	
From: (Range or ports)	To: (Range or ports)		
		Correction	

Except as otherwise provided herein, rates apply per ton of (2,000 lb) or (40 ft³) whichever produces the greater revenue.		Rate basis	1	2	Item [1]
Commodity Code	Commodity description and packaging				
	Fans, electric:	W/M	78.00		
	Glasses, sun	M	63.75		
	Lime, hydrated, packed	W	29.25		
	Tractors:				
	Unpacked	W/M	45.00		
	Packed	W/M	40.00		
	Zinc, viz:				
	Bars, circles, ingots, pigs, plates, sheets, shot, slabs.	2240 or 40 CF	29.00		
	Ingots:				
	Special rate effective May 1, 197.. expiring June 1, 197...	2240	27.00		
	Ingots:				
	Special rate effective June 1, 197.. expiring Sept. 1, 197...	2240	28.00		

[1] Optional column.

Explanation of use of this exhibit: Conference or Carrier; Single level of rates; one port or the same rate to several ports or range of ports; with temporary rates.

EXHIBIT No. 3

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

Except as otherwise provided herein, rates apply per ton of (2,240 lb.) or (40) ft³ whichever produces the greater revenue.		Type [1]	Rate basis	(Ports or range)	(Ports or range)	Item [1]
Commodity Code	Commodity description and packaging					
	Alcohols (effective May 10, 197..)[2] (I) [3]	C	100#	3.20	3.55	
		NC		3.88	4.17	
	Canned Goods:					
	Fish (A)[3]	C	100#	2.15	2.15	
	(A)[3]	NC		2.65	2.65	
	Vegetables:					
	48/9 oz. tins (A)[3]	C	Case	.93	.96	
	(A)[3]	NC		1.01	1.08	
	48/7 oz. tins (A)[3]	C	Case	.70	.75	
	(A)[3]	NC		.85	.90	

[1] As applicable.
[2] Issued under earlier effective date than other changes on page.
[3] Change symbols must be shown in the commodity description column either to the left or right of the commodity.

Explanation of the use of this exhibit: Conference or Carrier: Dual rate system; two ranges of destination ports; rates per case or per 100 lb.

EXHIBIT No. 4

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

Except as otherwise provided herein, rates apply per ton of (2,240 lb) or (40 ft³) whichever produces the greater revenue.		Type [1]	Rate basis	Rate	Item [2]
Commodity code	Commodity description and packaging				
	Fans, electric	C	W/M	63.75	
		NC		70.75	
	Glasses, sun; (I)[1]	C	M	63.75	
		NC		70.75	
	Lime, hydrated, packs	C	W	23.75	
		NC		20.50	
	Liquors		M	Open	
	Liquors, medicinal: Transferred to Medicines, patent preparations; (D) (R)[1]				
	Scotch, in barrels: Transferred to Liquors; (D) (A)[1]				

[1] Change symbols must be shown in the commodity description column either to the left or right of the commodity.
[2] As applicable.

Explanation of this Exhibit: Conference or Carrier; Dual-rate system; One range or ports; deletion of rates showing reduction and increase due to deletion.

EXHIBIT No. 5

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

Except as otherwise provided herein, rates apply per ton of (2,240 lb.) or (40) ft³ whichever produces the greater revenue.		Type [1]	Rate basis	(Ports or range)	(Ports or range)	Item [1]
Commodity Code	Commodity description and packaging					
	Iron and steel:					
	Turnbuckles		W	29.50	32.50	
	Emergency rate effective temporary 6-1-7.. to special 9-1-7.. (R).[2]		W	26.00	28.50	
	Medicines, patent preparations:					
	Value up to $200 per 40 ft³	C	M	34.00	37.50	
		NC		37.25	41.00	
	Value exceeding $200 but not exceeding $500 per 40 ft³.	C	M	52.75	58.00	
		NC		67.75	65.50	
	Value exceeding $500 per 40 ft³	C	M	67.75	74.00	
		NC	M	74.25	81.50	

[1] As applicable.
[2] Change symbols must be shown in the commodity description column either to the left or right of the commodity.

Explanation of the use of this exhibit: Conference or Carrier: Dual-rate system; Valuation rates and emergency, temporary or special rates.

EXHIBIT No. 6

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

Commodity Index

Commodity Code	Commodity	Class or Item No. [1]	Commodity Code	Commodity	Class or Item No. [1]
	Abrasive	2		Iron or steel articles viz:	
	Absorbent cotton	160		Balls, grinding	0
	Ale, ginger	3 M		Forgings	240
	Cotton, absorbent	160			

[1] Where tariff publishes both class and commodity rates, as above, the commodity item numbers should begin with the next counting unit; example- If class rates are in twelve classes then the commodity rates should not be numbered lower than 100.

Explanation of the use of this exhibit: Conference or Carrier; single level or dual-rate system; class or class and commodity tariff.

EXHIBIT No. 7

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

Class rates

Except as otherwise provided, rates apply per ton of (2,240 lb) or (40 ft³) whichever produces the greater revenue.	Class					
Ports to which rates apply	1	2	3	4	5	6
Ports A, B, C [1]:						
Contract	90.00	85.00	70.00	62.50	50.00	37.50
Noncontract	103.50	97.75	80.50	72.00	57.50	43.25
Ports D, E, F [1]	48.00	42.50	35.00	31.25	25.00	18.75

[1] As applicable to dual-rate or single level rate systems.

Explanation of the use of this exhibit: Conference or carrier; single level or dual-rate system; class rate tariff or class rate section of class and commodity tariff.

EXHIBIT No. 8

Name of carrier or conference and tariff number	Orig./Rev.	Page
	Cancels	Page
From: (Range or ports) To: (Range or ports)	Effective date	
	Correction	

ROUTING SECTION

The rules, regulations and rates apply to all transshipment arrangements between the participating carriers. Participating carriers have agreed to observe the rules regulations, rates and routings established herein as evidenced by the agreement on file with the Commission.

Agreement No. -----		
Carriers:	From:	To:
Originating: ABC S.S. Co	Japanese Ports	Manila
Delivering: XYZ Line, Inc.	Manila	U.S. Pacific Coast Ports
	Additional Charges: None	

Agreement No. -----		
Carriers:	From:	To:
Originating: ABC S.S. Co.	Naha, Okinawa	Kobe/Yokohama
Intermediate: XYZ Line, Inc.	Kobe/Yokohama	U.S. Pacific Coast Ports
Delivering: DEF Maritime Co.	U.S. Pacific Coast Ports	U.S. North Atlantic Ports
	Additional Charges: $4.50 W/M	

Agreement No. -----	Transshipment service restricted to shipments of frozen fish.	
Carriers:	From:	To:
Originating: XYZ Line, Inc.	Archonge	Seattle
Intermediate: PQR Line, Inc.	Seattle	Singapore
Delivering: ABC S.S. Co.	Singapore	Brunei

[FR Doc.77-33118 Filed 11-15-77;8:45 am]

[7035-01]

Title 49—Transportation

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES & REGULATIONS

[Service Order No. 1285]

PART 1033—CAR SERVICE

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AUTHORIZED TO OPERATE OVER TRACKS OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD CO.

AGENCY: Interstate Commerce Commission.

ACTION. Emergency Order (Service Order No. 1285.

SUMMARY: The State of Wisconsin has constructed a railroad bridge over a major highway in the vicinity of Schofield, Wisconsin, for use by the Chicago, Milwaukee, St. Paul and Pacific Railroad (MILW). A parallel line of the Chicago and North Western Transportation Company (CNW) also crosses this highway near Schofield. These two railroads have agreed to joint use of the Milwaukee bridge in this area. Service Order No. 1285 authorizes the CNW to use the tracks of the MILW between Schofield, Wisconsin, and Rothschild, Wisconsin, pending disposition of the application of the CNW for permanent authority to operate over these tracks of the MILW. No shippers will be deprived of service by this rerouting of CNW trains.

DATES: Effective 11:59 p.m., November 14, 1977. Expires 11:59 p.m., May 31, 1975.

FOR FURTHER INFORMATION CONTACT:

C. C. Robinson, Chief, Utilization and Distribution Branch, Interstate Commerce Commission, Washington, D.C. 20423, telephone: 202-275-7840, Telex 89-2740.

SUPPLEMENTARY INFORMATION: The order is printed in full below.

At a Session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 11th day of November, 1977.

The Chicago and North Western Transportation Co.'s (CNW) and the Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.'s (MILW) parallel lines intersect a major highway at Schofield, Wis. To improve public safety and reduce congestion, the State of Wisconsin (State) is completing a highway underpass under the line of MILW. To avoid the necessity of constructing a similar structure for the passage of CNW trains over this highway, the State has requested and the railroads have agreed to joint use of the MILW's tracks at this point. Rerouting of CNW trains over these tracks of the MILW will eliminate the hazards inherent in the operation of CNW trains over its present intersection with this highway without loss or reduction of railroad service to any shipper. It is the opinion of the Commission that operation by the CNW over these tracks of the MILW is necessary in the interest of the public pending disposition of the application of the CNW seeking permanent authority to operate over these tracks of the MILW; that notice and public procedure are impracticable and contrary to the public interest; and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1285 **Chicago and North Western Transportation Company authorized to operate over tracks of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.**

(a) The Chicago and North Western Transportation Co. (CNW) is authorized to operate over tracks of the Chicago, Milwaukee, St. Paul, and Pacific Railroad Co. (MILW) between MILW milepost 86.88 at Schofield, Wis., and milepos 88.03 at Rothcschild, Wis.

(b) *Application.* The provisions of this order shall apply to intrastate, interstate, and foreign traffic.

(c) *Rates applicable.* Inasmuch as this operation by the CNW over tracks of the MILW is deemed to be due to carrier's disability, the rates applicable to traffic moved by the CNW over the tracks of the MILW shall be the rates which were applicable on the shipments at the time of shipment as originally routed.

(d) Nothing herein shall be considered as a pre-judgment of the application of the CNW seeking authority to operate over tracks of the MILW.

(e) *Effective date.* This order shall become effective at 11:59 p.m., November 14, 1977.

(f) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., May 31, 1978, unless otherwise modified, changed, or suspended by order of this Commission.

(49 U.S.C. 1(12), (15), (16), and 17(2).)

It is further ordered, That copies of this order shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement and upon the American Short Line Railroad Association; and that notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board, members Joel E. Burns, Robert S. Turkington and John R. Michael. Member John R. Michael not participating.

H. G. Homme, Jr.,
Acting Secretary.

[FR Doc.77-33143 Filed 11-15-77;8:45 am]

[4310-55]

Title 50—Wildlife and Fisheries

CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

PART 32—HUNTING

Opening of Swanquarter National Wildlife Refuge, N.C., to Hunting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Special Regulation.

SUMMARY: The Director has determined that the opening to hunting of Swanquarter National Wildlife Refuge is compatible with the objectives for which the area was established, will utilize a renewable natural resource, and will provide additional recreational opportunity to the public.

DATES: Noon December 7, 1977 through January 20, 1978. Hunting permitted each day of the week except Sunday.

FOR FURTHER INFORMATION CONTACT:

James H. Roberts, Refuge Manager, Mattamuskeet National Wildlife Refuge, Rt. 1, Box N-2, Swanquarter, N.C. 27885, telephone: 919-926-4021.

SUPPLEMENTARY INFORMATION:

§ 32.12 **Special regulations; migratory game birds; for individual wildlife refuge areas.**

Hunting is permitted on the Swanquarter National Wildlife Refuge, N.C., only on the areas designated by signs as being open to hunting. These areas comprising 7,055 acres are delineated on maps available at the refuge headquarters and from the office of the Regional Director, U.S. Fish and Wildlife Service, 17 Executive Park Drive, N.E., Atlanta, Ga. 30329. Hunting shall be in accordance with all applicable State regulations subject to the following conditions:

1. A refuge hunt permit will be required of everyone wishing to hunt on the refuge.

2. Only ducks and coots may be taken in accordance with State and Federal regulations. Shooting of geese, swan, scoter, eider, old squaw, canvas back, red heads, or any other wildlife is prohibited.

3. Hunting is restricted to 12 gauge shotguns and steel shot shells only. No lead or other toxic shells or other gauge shotguns will be permitted.

4. Hunting season: Noon December 7, 1977 through January 20, 1978. Hunting permitted each day of the week except Sunday.

5. Shooting Hours: One half hour before sunrise until sunset. Hunters may enter hunting area one hour prior to legal shooting time.

6. Guns must be dismantled or encased while traveling to and from the hunt area.

7. No permanent or seasonal blinds will be allowed on the hunt area. Temporary blinds, carried in and out daily,

or made of native vegetation are permissible.

8. Hunters will not be permitted to hunt closer than 100 yards apart.

9. The use of dogs as retrievers is permissible and encouraged, but dogs must be under firm control at all times.

10. Each hunter under age 18 must be under the close supervision of an adult. For safety reasons the ratio should be one adult to one juvenile, but in no case should one adult have more than two juveniles under his/her supervision.

The provisions of this special regulation supplement the regulations which govern hunting on wildlife refuge areas generally which are set forth in Title 50, Code of Federal Regulations, Part 32. The public is invited to offer suggestions and comments at any time.

NOTE.—The U.S. Fish and Wildlife Service has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 on OMB Circular A-107.

Dated: October 28, 1977.

RAY R. VAUGHN,
Deputy Regional Director.

[FR Doc.77-33083 Filed 11-15-77;8:45 am]

[4310-55]

PART 32—HUNTING

Opening of Swanquarter National Wildlife Refuge, N.C.

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule adds Swanquarter National Wildlife Refuge to the list of refuge areas open for the hunting of migratory game birds. The Director has determined that this action is compatible with the major purpose for which this refuge was established, with the principles of sound wildlife management and is in the public interest. Hunting, subject to annual special regulations, will provide additional public recreational opportunity.

EFFECTIVE DATE: December 6, 1977.

FOR FURTHER INFORMATION CONTACT:

Donald G. Young, Division of National Wildlife Refuges, U.S. Fish and Wildlife Service, Washington, D.C. 20240, telephone: 202-343-4305.

SUPPLEMENTARY INFORMATION: Donald G. Young is the principal author of this final rule. On September 21, 1977, there was published (42 FR 47572) a notice of proposed rulemaking adding Swanquarter National Wildlife Refuge, N.C., to the list of refuge areas which are open for the hunting of migratory game birds. As a general rule, most areas within the National Wildlife Refuge System are closed to hunting until officially opened by regulation.

The public was provided a brief comment period and was advised that an environmental assessment has been prepared on the proposal and was available for public inspection. Three favorable comments were received on the proposed rulemaking.

NOTE.—The U.S. Fish and Wildlife Service has determined that this document does not contain a major proposal requiring preparation of an economic impact statement under Executive Order 11949 and OMB Circular A-107.

Accordingly, 50 CFR Part 32 is amended by the addition of Swanquarter National Wildlife Refuge as follows:

§ 32.11 List of open areas; migratory game birds.

NORTH CAROLINA

* * * * *

SWANQUARTER NATIONAL WILDLIFE REFUGE

Dated: November 9, 1977.

LYNN A. GREENWALT,
Director, United States Fish and Wildlife Service.

[FR Doc.77-33084 Filed 11-15-77;8:45 am]

[4310-55]

PART 33—SPORT FISHING

Opening of Kirwin National Wildlife Refuge, Kans. to Sport Fishing

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Special Regulation.

SUMMARY: The Director has determined that the opening to sport fishing on the Kirwin National Wildlife Refuge is compatible with the objectives for which the area was established, will utilize a renewable natural resource, and will provide additional recreational opportunity to the public.

DATES: January 1 through December 31, 1978.

FOR FURTHER INFORMATION CONTACT:

Keith S. Hansen, Kirwin, Kans. 67644, telephone: 913-646-2373.

SUPPLEMENTARY INFORMATION:

§ 33.5 Special regulations; sport fishing for individual wildlife refuge areas.

Sport fishing on the Kirwin National Wildlife Refuge, Kans. is permitted from January 1 through December 31, 1978, inclusive, on all areas not designated by signs as closed to fishing. These open areas, comprising 5,000 acres, are delineated on maps available at refuge headquarters, 5 miles west of Kirwin, Kans., and from the Area Manager, Fish and Wildlife Service, Suite 106, Rockcreek Office Building, 2701 Rockcreek Parkway, North Kansas City, Mo. 64116. Sport fishing shall be in accordance with all applicable State regulations.

The provisions of this special regulation supplement the regulations which govern fishing on wildlife refuge areas generally which are set forth in Title 50, Code of Federal Regulations, Part 33, and are effective through December 31, 1978. The public is invited to offer suggestions and comments at any time.

NOTE.—The U.S. Fish and Wildlife Service has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular A-107.

Dated: October 26, 1977.

KEITH S. HANSEN,
Refuge Manager.

[FR Doc.77-33055 Filed 11-15-77;8:45 am]

proposed rules

[8010–01]

SECURITIES AND EXCHANGE COMMISSION

[17 CFR Part 240]

[Release No. 34–14157; Filed No. S7–728]

SHORT TENDERING RULE

Proposed Amendment of Rule 10b–4 Under Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission proposes to amend its rule regulating the practice of "short tendering" during tender and exchange offers. If adopted, the proposed amendments would provide definitions, and substantive antifraud provisions for the purpose of protecting investors, with respect to practices during tender offers for any securities.

DATES: Comments should be submitted on or before January 13, 1978.

ADDRESSES: Persons wishing to submit written views, data and arguments should file six copies of their comments with George A. Fitzsimmons, Secretary, Securities and Exchange Commission, room 892, 500 North Capitol Street, Washington, D.C. 20549. All submissions should refer to File No'. S7–728 and will be available for public inspection at the Commission's Public Reference Room, room 6101, 1100 L Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Mary Sebek, Office of Market Structure and Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549, 202–755–8748.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission announced today that it has published for comment a proposal to amend Rule 10b–4 (17 CFR 240.10b–4) under the Securities Exchange Act of 1934 (the "Act") (15 U.S.C. 78a et seq., as amended by Pub. L. 94–29, 89 Stat. 97 (June 4, 1975)). The Commission is also soliciting comment on certain policy questions relating to the tender process in connection with tender and exchange offers. Rule 10b–4 was adopted by the Commission on May 28, 1968,[1] for the purpose of prohibiting "short tendering," i.e., tendering more shares than a person owns in order to avoid or reduce the risk of pro rata acceptance in tender and exchange offers for less than all the outstanding securities of a class ("partial offers"). The proposed amendments to Rule 10b–4 (the "Proposed Amendments"), if adopted, would be promulgated pursuant to Sections 10(a), 10(b), 14(e) and 23(a) of the Act (15 U.S.C. 78j(a), j(b), n(e) and w(a)).

BACKGROUND

A tender offer can be for cash, for an exchange of the offeror's securities or a combination of cash and securities, and is usually open for a specified period of time. Partial offers are characterized by the risk that not all shares tendered will be accepted.

Prior to 1968, tender offers and the conduct of the participants in such offers were largely unregulated. As the number of tender offers increased, it became apparent that the tender process was susceptible to a number of abuses tending to disrupt the fairness and orderliness of the trading markets for the securities of both the person making a tender offer (the "offeror") and the person whose securities were sought in the tender offer (the "target shareholder"). Congressional awareness of these abuses and the increasing popularity of the tender offer as a technique for acquiring control of public companies[2] resulted in the introduction of federal legislation intended to provide comprehensive and evenhanded protection to all participants in the tender offer process.[3] After extensive hearings, legislation, adding Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Act[4] was adopted in 1968 (the "Williams Act") (15 U.S.C. 78m(d), m(e), n(d), and n((f)). Section 14(e) of the Act makes it unlawful for "any person * * * to engage in any fraudulent, deceptive or manipulative acts or practices in connection with any tender offer or request or invitation for tenders * * *." In 1970, Section 14(e) was amended to give the Commission rulemaking authority to define and prohibit such acts and practices.[5]

In order to reduce or eliminate the risks of partial acceptance during tender offers, a person who desired to have his securities accepted in full at the tender offer price (and who, for example, estimated 50 percent acceptance by the offeror) would indicate a desire to tender twice as many shares as he actually owned. Assuming his calculations (and estimates) were correct, the result would be that the offeror accepted all the shares the tendering person actually owned. This practice became known as short tendering.

In testimony before the Subcommittee on Securities of the Senate Banking and Currency Committee in 1967 on the legislation which became the Williams Act, the Commission indicated its belief that short tendering represented an abuse of the tender process.[6] In particular, the Commission noted that, by tendering a greater number of securities than were owned, market professionals were able to secure acceptance of a disproportionately larger number of the securities tendered by them than other persons, tendering only securities which they owned, could obtain.[7] The Senate Banking and Currency Committee agreed with the concern expressed by the Commission with respect to the abuses caused by short tendering but concluded that the Commission had "adequate power to deal with the abuse of short tendering under the antifraud provisions of the Securities Exchange Act."[8]

Thereafter, pursuant to Section 10(b) of the Act, the Commission published proposed Rule 10b–4 for comment[9] and, after reviewing the comments received, adopted Rule 10b–4 on May 28, 1968,[10] for

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[1] Securities Exchange Act Release No. 8321 (May 28, 1968), 33 FR 8269 (1968).

[2] Although the legislation which eventually was enacted was directed at takeover bids, tender offers are not necessarily limited to those undertaken for the purpose of acquiring control. Thus, a tender offeror may include the issuer of the subject securities as well as an unrelated individual, group, or corporation.

[3] The original tender offer legislative proposal was introduced by Senator Harrison A. Williams in 1965. Subsequently, the bill was substantially revised and S. 510, the legislative proposal which formed the basis for the bill which was eventually enacted, was introduced in the Senate in 1968.

[4] Pub. L. 90–439, 82 Stat. 455 (July 29, 1968).

[5] Pub. L. 91–567, 84 Stat. 1497 (December 22, 1970).

[6] *See* Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. at 198–199 (1967) ("Hearings").

[7] This practice was facilitated by the willingness of offerors to accept guarantees of delivery by banks and members of national securities exchanges in lieu of actual delivery of certificates representing securities tendered. The Commission indicated that while this guarantee procedure was a "simple and reasonable provision commonly included in tender offers for the protection of certain stockholders," the practice of short tendering which it facilitated was a "perversion" of the guarantee process. Hearings at 198–199.

[8] S. Rep. No. 550, "Report to Accompany S. 510," 90th Cong., 1st Sess. (1967) at 5.

[9] Securities Exchange Act Release No. 8224 (January 3, 1968), 33 FR 513 (1968).

[10] *See* note 1 supra. Rule 10b–4 was adopted prior to the passage of the Williams Act on July 29, 1968.

specific purpose of prohibiting short tendering. Rule 10b–4 makes it a "manipulative or deceptive device or contrivance as used in Section 10(b) of the Act, for any person, in response to a tender offer for or a request or invitation for tenders of, any security" to tender securities which he does not own. The Rule applies to all cash tender and exchange offers whether made by a third party or by the issuer of the securities sought.[11] Paragraph (a) of Rule 10b–4 requires that, if a person tenders a security (or causes it to be tendered on his behalf, directly or indirectly, by means of a guarantee) he must own that security, as ownership is defined in paragraph (b) of the Rule.

THE NEED FOR AMENDMENT

Since its adoption in 1968, Rule 10b–4 has contributed to the prevention of fraud and deception in connection with tender offers by promoting equality of opportunity and risk for all tendering securityholders. The Commission, however, believes that short sales of securities sought in a tender offer ("subject securities"), loans of subject securities for purposes of facilitating such short sales and guarantees of delivery, in combination, can frustrate achievement of the Rule's objectives.[12]

As more fully discussed below, the Commission is concerned that these practices in connection with partial tender offers can have much the same effect as short tendering, adversely affecting the fairness of the markets during and immediately after such offers and thwarting the goal of assuring equal treatment for all participants in tender offers.[13]

In addition to publishing the Proposed Amendments for comment, the Commission is soliciting comment on a number of policy questions and certain alternative approaches to the appropriate regulation of short tendering and other trading practices in connection with tender offers.

SUMMARY OF PROPOSED AMENDMENTS

Paragraph (b)(1) of the Proposed Amendments would require persons who tender (as defined in paragraph (a)(6)) subject securities to own the securities tendered or an equivalent security (as defined in paragraph (a)(3)) from the time of tender through the earlier of (i) the last date on which tenders may be made pursuant to the terms of the offer or (ii) the date on which the tender is rejected or withdrawn. Paragraph (b)(1) would also require tendering persons to deliver or cause to be delivered the subject securities tendered (or equivalent securities) to the tender offeror within the period specified by the offer.[14]

Paragraph (b)(2) would prohibit a person from tendering a security on behalf of another person unless he reasonably believes that such person is and will continue to be in compliance with the requirements which would be imposed by paragraph (b)(1) of the Proposed Amendments.

Paragraph (b)(3) would require a person guaranteeing the tender of securities (a "facilitating person")[15] to (i) maintain a long position in the subject securities (or equivalent securities) for those on whose behalf guarantees are given equal to the amount of subject securities delivery of which is guaranteed, and (ii) have in his possession or under his control sufficient subject securities (or equivalent securities to cover the aggregate amount of such securities as to which he has given guarantees. These obligations would continue throughout the period during which tenders may be made, or until a tender made by means of a guarantee has been rejected or withdrawn, whichever first occurs.

Paragraph (b)(4) would prohibit any person from lending any security to another person during a tender offer unless the person lending the security reasonably believes that such loan is not for the purpose of facilitating a tender by the person borrowing such securities for his own account.

Paragraph (b)(5) would impose withdrawal obligations on a person who tendered on behalf of another and later learned that the person on whose behalf the tender was made did not own, or no longer owned, the subject security.

Paragraph (b)(6) would prohibit a person from effecting a short sale of a subject security during a tender offer unless he delivered the subject security to the purchaser (or his agent) by the last date on which tenders may be made pursuant to the offer.

Paragraph (b)(7) makes it a manipulative or deceptive device or contrivance and a fraudulent, deceptive or manipulative act or practice for a person to effect, directly or indirectly, any transaction in subject securities or equivalent securities with the intent or purpose of evading the provisions of the Rule.

Paragraph (a)(1) would alter the concept of ownership presently used in Rule 10b–4. The new approach would abandon the concept of title[16] and of ownership based upon purchases and contracts to purchase presently embodied in Rule 10b–4(b)(2). The proposed test of ownership for purposes of the Rule contemplates that a person must (i) have acquired the security for his own account otherwise than by borrowing the security, (ii) have the right to dispose of the security (or to direct its disposition), and (iii) have the security owned and in his possession or "under his control," as the latter term would be defined in paragraph (a)(2) of the Proposed Amendments. Subject securities would be considered under a person's control only when those securities are in that person's custody or in the custody of an agent (e.g., a broker) or a sub-agent (e.g., a clearing corporation) free and clear of any lien, or are in the possession of a creditor of such person (e.g., a broker or a bank) or of a creditor of such a creditor (e.g., a lender to the broker), as collateral for such person's or his creditor's indebtedness under circumstances where delivery of the securities can be compelled upon payment of the indebtedness or substitution of collateral.

The term "equivalent security" would be defined in paragraph (a)(3) as any security (including any option, warrant or other right to purchase) issued by the person whose securities are the subject of the offer which is convertible into or exchangeable or exercisable for a subject security. An "equivalent security" also would include any other option or right entitling the holder to acquire a subject security, but only of the holder reasonably believes that the person obligated to deliver the subject security upon exercise of the option or right (i) owned and will continue to own the subject security from the time of any tender in reliance upon such option or right through the date on which such tender is ac-

[11] Although exempt from the provisions of Section 14(d), tender offers by an issuer are subject to the antifraud provisions of Section 14(e) of the Act.

[12] The Commission's concerns may be illustrated by the following example: In a partial offer, A, the owner of 400 shares of the subject securities, tenders all of his securities by means of a guarantee of delivery from the broker. Immediately thereafter, A sells short to B 200 shares of the subject securities. B, having entered into an unconditional contract to purchase the subject securities from A, but prior to receiving those securities, tenders the 200 shares which he is deemed to own by securing a guarantee of delivery from his broker. Before A is required to deliver securities to B in settlement of his short sale, the tender offer expires, and the offeror announces that only 50 percent of the stock tendered (physically or through guarantees) will be accepted. A delivers 200 shares to B, who delivers 100 shares to the offeror in satisfaction of the guarantees. In effect, A has successfully tendered all of his 400 shares while other tendering securityholders have been prorated. Whether A receives a net price equivalent to what he would have received if the 400 shares had been accepted in full by the offeror will depend on the price which he was able to receive for selling the 200 shares and the price at which he covers his short sale.) Moreover, A's sort sale process created a new long position which resulted in a double tender of the same shares by both A and B.

[13] See note 16 supra, at 70–71; see also, 113 Cong. Rec. 854–855 (1967).

[14] The Commission understands that it is customary for the terms of an offer to permit delivery of securities which have been tendered through a guarantee after the offer closes, i.e., the date after which no shares can be tendered. The Commission specifically solicits comments on the appropriateness of this practice and would like to receive examples of time periods used in particular offers, how and when offerors determine to return oversubscriptions and procedures followed by offerors between the close of an offer and the guarantee date.

[15] Paragraph (a)(8) of the Proposed Amendments would define a facilitating person as any person giving a guarantee that subject securities will be delivered to the person making an offer.

[16] *See* Uniform Commercial Code §§ 1–201 (32), 8–320 et seq.

cepted, rejected, or withdrawn and, (ii) upon exercise of such option or right, will deliver the subject security within a period consistent with normal delivery times in the securities business. Options not issued by the issuer of the subject securities, e.g., options traded on national securities exchanges, would be excluded from the definition of equivalent securities by paragraph (a)(3)(i) of the Proposed Amendments.[17] Paragraphs (a)(4) and (a)(5) of the Proposed Amendments would define the terms "offer" and "subject securities," respectively. Additionally, the term "tender" would be defined for purposes of the Rule in paragraph (a)(6) of the Proposed Amendments to encompass all methods by which a person can affirmatively respond to a request or invitation for tenders. Finally, a "tendering person" would be defined in paragraph (a)(7) of the Proposed Amendments as the person making a tender or on whose behalf a tender is made.

Paragraph (c) would provide for exemptive relief in appropriate cases (e.g., where adequate factual representations as to ownership and inaccessibility of the subject securities or equivalent securities can be secured).

OWNERSHIP

Rule 10b–4's concept of ownership based on title, purchases or contracts to purchase no longer appears adequate to assure that abuse of the acceptance mechanism utilized in tender offers does not occur. In particular, permitting a person to satisfy the ownership standard solely by entering into a contract to purchase may result, under certain circumstances, in securities being tendered twice (e.g., a securityholder may tender and thereafter engage in a short sale, thus entitling the person to whom he sold to tender on the basis of his agreement to purchase even before the purchase had been consummated by payment and delivery). To avoid this problem, the Proposed Amendments would require tendering securityholders to have the subject securities tendered in their possession or under their control (as that term is defined in paragraph (a)(2)) at the time of tender through the earlier of the time of acceptance, withdrawal or rejection. In addition, the Proposed Amendments would require short sellers of subject securities during a tender offer to make delivery to the purchaser (or his agent) no later than the last day of the offer. This latter provision is intended to assure that purchasers of subject securities from short sellers during a tender offer will be in a position to take advantage of the offer by qualifying as "owners" of the subject securities within the meaning of the Rule.

TENDERS ON BEHALF OF OTHERS, LOANS AND GUARANTEES

Although the Commission has concurred in the view that, in appropriate circumstances, guarantees of delivery can perform a salutary function in connection with tender offers,[18] the Commission is concerned that such guarantees are utilized in instances where it is neither necessary nor appropriate to do so in view of the purposes of Rule 10b–4. In addition, it appears that guarantors do not always take adequate steps to ascertain whether persons for whom they tender by means of guarantees in fact own the subject securities and will be able to deliver them within the time specified in the offer. The Proposed Amendments are intended to remedy these problems.

Paragraph (b)(2) would require persons tendering on behalf of others to have a reasonable basis for believing that other persons are in compliance with the ownership requirements of the Rule. The Rule's present provision, permitting those tendering on behalf of other persons to rely solely upon information provided by such persons to establish their right to tender, seems susceptible to abuse since guarantors are not required specifically to consider all relevant circumstances. The Proposed Amendments would substitute a "reasonable belief" test to ensure appropriate inquiry by guarantors.

Loans of subject securities where the lender knows he is facilitating a tender by the borrower for the borrower's own account would be expressly proscribed by paragraph (b)(4) in order to prevent lenders from aiding short tendering schemes. Loans for other purposes, including loans to permit brokers to tender for margin customers by guaranteeing delivery in accordance with paragraph (b)(3), would not be affected by the prohibition.[19] Commentators are specifically requested to address the impact this proposal, if adopted, would have on the practices currently in effect regarding loans of securities by broker-dealers, institutional investors, and others, during the duration of a tender offer.

Guarantors would be required by paragraph (b)(3) of the Proposed Amendments to (i) maintain a long position in the subject securities for those on whose behalf guarantees are given equal to the amount of subject securities guaranteed, and (ii) have in their possession or under their control sufficient subject securities to cover the aggregate amount of such securities as to which they have given guarantees. These obligations with respect to each guarantee would continue through the period during which tenders may be made (or until the tender made by means of a guarantee has been rejected or withdrawn, whichever first occurs). In tandem with the operation of paragraph (b)(2), this limitation on a guarantor's ability to give a guarantee is intended to preclude the giving of guarantees which the guarantor has no reasonable basis for believing that the person for whom the guarantee is given owns the securities tendered or that delivery can be made as and when required otherwise than by acquiring securities in the market after the offer closes. In addition, this provision is intended to restrict the amount of securities available for loans to short sellers where the activities of short sellers can generate long positions which may give rise to tenders of the same securities more than once.

In combination, the new restrictions on loans and guarantees contained in paragraphs (b)(3) and (b)(4) preclude persons whose securities are inaccessible (i.e., not in the possession or control of a person able to guarantee delivery) from tendering such securities unless, upon a proper showing of need, an exemption from the Rule is obtained.

Paragraph (b)(5) would impose withdrawal obligations on persons who tender on behalf of others and later learn that a person on whose behalf a tender was made did not own, or no longer owns, the subject security. This provision is intended to assure that facilitating persons (as defined) respond to changes in the tendering securityholders' ownership of the subject securities by withdrawing, to the extent necessary, their guarantees.

SHORT SELLING

Paragraph (b)(6) would make it unlawful for a person to effect a short sale of the subject security during a tender offer unless delivery is made to the purchaser (or his agent) no later than the last day on which tenders can be made. In most instances, except during the last few days of a tender offer, this requirement would not impose greater delivery obligations on short sellers than those to which they are presently subject.[20] During the last days of a tender offer, however, paragraph (b)(6) subjects short sellers to new delivery constraints. This limitation on short selling during an offer would help to assure that tendering securityholders who acquired subject securities from short sellers have possession of the subject securities.

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[17] While paragraph (a)(3)(ii) of the Proposed Amendments includes "any other option" within the definition of "equivalent security," holders of exchange traded call options could not, under existing circumstances, meet the test to be established by that paragraph, i.e., that they have a reasonable belief that the person obligated to deliver the underlying security owns it. See note 21 infra and accompanying text.

[18] See note 7 supra.

[19] The allocation of securities in the possession or control of a broker to a customer who is long on the broker's books is not considered a loan by the broker, even though the broker may have had to borrow those securities for that purpose (e.g., to cover a "fail to receive").

[20] Commentators are specifically requested to address the question of whether a different time period would be desirable. See, e.g., NYSE Rule 2440C.10; NASD Uniform Practice Code, Section 12 Paragraph 3512. The Commission has previously cautioned broker-dealers that, in connection with short sales, delays in the delivery of the securities which are the subject of the short sale generally involve a violation of the antifraud provisions of the Federal securities laws. See Securities Exchange Act Release No. 6778 (April 16, 1962), (27 FR 3991).

EQUIVALENT SECURITIES

The provisions of the Proposed Amendments governing equivalent securities would codify certain existing practices and interpretations with respect to tenders based upon rights to acquire subject securities and, in the case of standardized options, impose additional limitations upon tenders by persons exercising such securities. It should be noted that, for purposes of the Rule, standardized call options would not be deemed to be equivalent securities since the holder of such an option cannot know that the Options Clearing Corporation ("OCC") (the entity responsible for fulfilling the option contract by delivering the underlying security in the event of exercise) "owns" the underlying security within the meaning of the Rule.[21] Because an unlimited number of options can be written on an uncovered basis, the Commission believes that Rule 10b–4 should not permit option holders to tender unless they have irrevocably exercised those options and reduced the underlying securities to possession or control.[22] Since "double tendering" is intended to be precluded, any other result would be inappropriate unless persons who have written options on subject securities were required to count the securities underlying those options against their "net long" positions for purposes of the Rule (a harsh result where exercise of such options cannot be predicted).

MISCELLANEOUS

Paragraph (b)(7) of the Proposed Amendments would make explicit that any transaction in a subject security effected, directly or indirectly, for the purpose of evading the provisions of the Rule constitutes a separate violation of the Rule.

Provision for exemptive relief from the Rule has been added in paragraph (c) of the Proposed Amendments. If the Proposed Amendments are adopted, exemptive relief would be granted sparingly, and then only upon written request in those instances where, for example, factual representations make the need for and appropriateness of such relief apparent.

ALTERNATIVE REGULATORY APPROACHES

In addition to publishing the Proposed Amendments for comment, the Commission wishes to solicit comment on certain policy issues relating to tendering practices and market transactions during tender offers. In particular, the Commission is soliciting comment on the desirability of pursuing such alternative measures as (i) prohibiting all short selling during the tender offer period; (ii) prohibiting all tenders by means of guarantees or barring "self-guarantees" of delivery; or (iii) permitting short tendering, but only under circumstances precluding "double-tendering."

1. PROHIBITING ALL SHORT SELLING DURING THE TENDER OFFER PERIOD

It seems apparent that the extent to which offerors find it necessary to prorate acceptance of securities tendered in response to partial offers is affected by the amount of short selling activity in those securities during the tender period (because many of the securities purchased from short sellers are tendered in response to the offer). Under the provisions of paragraph (b) of the present Rule, an unlimited number of potential tendering securityholders can be created by short sale activity during an offer since every purchaser from a short seller has entered into an unconditional binding contract to purchase the subject securities and thus is deemed to own the securities for purposes of the Rule.

Under the Proposed Amendments, the Commission would impose limited restrictions on short sellers during the offering period (primarily upon their delivery obligations within last few days of an offer) and, in addition, would rely on the possession and control concepts contained in subparagraph (a)(2) of the Proposed Amendments to preclude double tendering (and possibly short tendering) generated by short sales. Commentators are invited to submit views as to whether this objective could be achieved more simply and appropriately by prohibiting all short sales of subject securities in a partial offering during the offer period.[23] Persons submitting arguments in support of this view should address the potential impact on the market for, and price of, the subject security if this alternative approach were implemented. The Commission is particularly interested in receiving comment regarding the benefits, if any, which insure to investors and the trading markets as a result of short sale activity during tender and exchange offers.

2. GUARANTEES OF TENDER

The practice of permitting tenders to be effected by means of guarantees (i.e., without physical delivery of securities to the offeror) was intended to accommodate "security holders who may be out of town or otherwise may be unable to deposit the securities at the time of tender."[24] However, it appears that the guarantee process is utilized primarily by market professionals to effect tenders for their own accounts rather than to facilitate tenders by investors who are unable, during an offer, to make physical delivery of their securities within the time required by the offer.[25] Commentators are asked to consider whether, in light of the potential for abuse of the tender process inherent in the use of guarantees, all tenders by means of guarantees should be prohibited or, alternatively, whether guarantees should be permitted only on behalf of persons other than the guarantor or persons other than brokers or dealers.

If tendering by means of a guarantee were to be prohibited, such a prohibition would substantially alter the dynamics of the trading market for securities sought in a tender or exchange offer since persons wishing to purchase securities in order to participate in an offer would have to be certain that they would receive the securities purchased in time to be able to effect physical delivery to the offerer. As a practical matter, the Commission believes that existing clearing and settlement practices, and the fact that certificates may be temporarily unobtainable as a result of pledges or while in transit, make it necessary to permit tenders by means of guarantees. Nevertheless, the Commission wishes to receive comment on whether it is appropriate to continue to permit tenders by means of guarantees and the feasibility of limiting use of the guarantee device to guarantees on behalf of persons other than a broker-dealer.

3. PERMITTING SHORT TENDERING IN LIMITED CIRCUMSTANCES

Rule 10b–4 is intended, among other things, to ensure equality of opportunity for tendering securityholders in partial offers where subject securities are accepted on a pro rata basis. At the time the Rule was published for comment,[26] however, some commentators suggested that prohibiting short tendering would be harmful to public securityholders. They argued that, so long as market professionals engaging in arbitrage during tender offers were able to short tender to hedge their risks, they would make market purchases of subject securities at higher prices than would otherwise be the case, and that such purchases benefit holders of subject securities who did not wish to accept the

[21] OCC never "owns" securities underlying options but, instead, is the obligor on every option contract. See Prospectus, Options Clearing Corporation (October 31, 1977).

[22] The Commission specifically requests commentators to address the questions raised by the existence, in certain offers, of exchange traded options for subject securities. Inasmuch as exchange trading in options did not exist when Rule 10b–4 was adopted in 1968, the Commission is soliciting comments on, and examples of, the effect option transactions have had during tender offers for underlying subject securities, with particular reference to partial tender offers and the purpose underlying Rule 10b–4. Commentators should address the problems associated with tender offers for a substantial portion of an issuer's securities where those securities are the subject of underlying exchange traded call options and holders of substantial numbers of options exercise them with the intent of tendering the securities expected to be obtained upon such exercise.

[23] Commentators may wish to submit their views concerning this limited prohibition against short selling in the broader context of the Commission's previously announced determination to consider an experiment involving the deregulation of all short selling. See Securities Exchange Act Release No. 13091 (December 21, 1976), (41 FR 56530).

[24] See note 1 supra.

[25] See, e.g., "SEC v Weisberger," [1974–75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,108 (S. D.N.Y., 1975).

[26] See note 9 supra.

risk of proration in tender offers or the risk that such offers will not be successful.[27] It also was argued that the risk of "double tendering" rather than short tendering was responsible for the potentially disparate and inequitable treatment of tending shareholders during partial offers and, therefore, that regulation should be designed only to prevent "double tendering."[28]

If a mechanism can be developed to prevent a person who lends his securities from also tendering those securities (e.g., by means of the ownership tests set forth in the Proposed Amendments), it might be argued that short tendering (without the harmful effects of double tendering) should be available for all persons.

Commentators who believe that short tendering should be permissible if mechanisms can be developed to prevent double tendering should specifically comment on whether allowing such short tendering would adversely affect the opportunity for security holders to have their tendered securities accepted on a fair basis (e.g., by pro rata acceptance).

The Commission has not solicited public comment on the mechanical aspects of tender and exchange offers since the Williams Act was adopted in 1968.[29] For that reason, in addition to the specific proposals and questions raised herein, commentators are specifically invited to submit their views on the general practice of short tendering, problems which have arisen as a direct or indirect result of guarantees of tender (particularly self-guarantees), short selling practices during tender offers, and any other aspects of the tender and exchange offer process which would assist the Commission in its consideration of the Proposed Amendments.

Municipal Securities

Rule 10b–4 is applicable to an offer for, or a request or invitation for tenders of, any security, including municipal securities. Although Rule 10b–4 has, by its terms, applied to municipal securities since its adoption in 1968, the Commission has not until recently become aware that transactions contemplated by Rule 10b–4 may occur during tender offers for municipal securities.[30] It has recently been suggested to the Commission that, in response to invitations for tenders of their securities by municipalities, market professionals often tender more securities than they actually own in the expectation that, in view of the supply of securities being sought by the municipality, and the range of prices at which tenders will be accepted, such short tenders will yield a satisfactory profit. Since invitations for tenders of their securities by municipalities generally specify that tenders will be accepted at the lowest price first until the desired amount has been purchased, a certain amount of the securities tendered in response to such invitation often is returned (in a manner roughly analogous to returns of excess securities in tender offers where acceptance is pro rated by the offeror).

By letter dated September 7, 1977, the Municipal Securities Rulemaking Board ("MSRB") urged that Rule 10b–4 not be applied to tender offers by municipal securities issuers. According to the MSRB, "although there is scant opportunity for abuse in connection with short tendering in municipal securities, there would be adverse consequences from a prohibition of short tendering. In particular, short tendering enhances competition in pricing offers to municipal securities issuers and thus tends to lower the price or prices to be paid by such issuers.

The Commission specifically solicits comments on the appropriateness of applying Rule 10b–4 to tender offers for municipal securities. Commentators are requested to: (1) Provide examples of short tendering practices during tender offers for municipal securities; (2) address whether Rule 10b–4 should be amended to exempt municipal securities, in whole or in part, from its application and (3) consider, assuming that the Rule does apply to municipal securities, the effects which compliance with the Proposed Amendments would have on tender offers for municipal securities by the issuers of these securities. Commentators should address the potential conflict between the objectives of permitting municipal issuers to purchase their own securities at the lowest possible prices (particularly through the "lowest price first" acceptance procedure sometimes utilized in municipal issuer tender offers) and ensuring equality of opportunity for all tendering securityholders in such offers.

Effects on Competition

The Commission is not aware of any burden on competition imposed by the Proposed Amendments that would not be necessary or appropriate in furtherance of the purposes of the Act; however, comments on the impact of the Proposed Amendments on competition in light of the purposes of the Act are specifically requested.

Request for Comment

In consideration of the foregoing, it is proposed to amend 17 CFR Chapter II by revising § 240.10b–4 pursuant to the authority under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq., as amended by Pub. L. No. 94–29, 89 Stat. 97 (June 4, 1975)). The amendments to Rule 10b–4 are proposed pursuant to Sections 10(a), 10(b) 14(e) and 23(a) of the Act (15 U.S.C. 78j(a), j(b) n(e) and w(a)). The text of Rule 10b–4 has been completely revised as follows and, accordingly, deletions from or additions to the present Rule are not indicated:

§ 240.10b–4 Short tendering of securities.

(a) For the purposes of this section:

(1) A person shall be deemed to own a subject security or an equivalent security only if: (i) He has acquired the security for his own account, otherwise than by borrowing the security, has the right to dispose of it or direct its disposition, and has such security in his possession or under his control, or (ii) in the case of a subject security, he has converted, exchanged or exercised an equivalent security owned (within the meaning of subparagraph (1)(i) of this paragraph) by such person; *Provided, however,* That a person shall be deemed to own a security only to the extent that he has a net long position in such security;

(2) A person shall be deemed to have a security under his control only if such security; (i) Is in his custody or in the custody of his agent (or a sub-agent of such agent), is held for such person's account, free of any charge, lien or claim of any kind in favor of any other person, and delivery of such security to such person can be required without the payment of money or value, or (ii) is in the possession of a creditor of such person (or in the possession of a creditor or an agent of either of them) as collateral for such person's or his creditor's indebtedness pursuant to an arrangement entitling such person and his creditor to obtain delivery of such security upon payment of the indebtedness or substitution of other collateral; and

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[27] See Letter dated February 3, 1968, from Sullivan & Cromwell to the Securities and Exchange Commission in response to Securities Exchange Act Release No. 8224.

[28] Id.

[29] The Commission considered certain collateral issues during the 1974 tender offer hearings. See "Public Fact-Finding Investigation in the Matter of Beneficial Ownership, Takeovers and Acquisitions by Foreign and Domestic Persons, Securities Act Release Nos. 5529 (September 9, 1974), (39 FR 33835) (1974) and 5538 (November 5, 1974), (39 FR 41233) (1974). More recently, the Commission solicited comment on proposals to amend the tender offer rules under the Act, see Securities Exchange Act Release No. 12676 (August 2, 1976), (41 FR 33004) (1976) and subsequently adopted a new Schedule 14D–1 setting forth disclosure requirements for persons making certain tender offers, see Securities Exchange Act Release No. 13787 (July 21, 1977), (42 FR 38341) (1977).

[30] In Securities Exchange Act Release No. 11876 (November 26, 1975), (40 FR 60084), (1975), the Commission adopted temporary Rule 28a–1(T) (17 CFR 240.28a–1(T)) under the Act, relating to the regulation of municipal securities brokers, municipal securities dealers and transactions in municipal securities in accordance with the summary rulemaking provisions of the Administrative Procedure Act. (5 U.S.C. 553(b)(3)(B)). The purpose of temporary Rule 28a–1(T) was to suspend the operation of certain rules under the Act, pending consideration of certain proposed amendments to those rules to prevent their application to municipal securities professionals who would otherwise have become subject to those rules on December 1, 1975 (pursuant to the provisions of the Securities Acts Amendments of 1975). In that release, the Commission indicated that there was no deed to temporarily suspend the operations of Rule 10b–4 since it did not appear to have any application to the way in which municipal securities were distributed or traded. That view appears to have been incorrect.

(3) The term "equivalent security" shall mean: (i) Any security (including any option, warrant or other right to purchase) issued by the person whose securities are the subject of the offer which is immediately convertible into or exchangeable or exercisable for a subject security, or (ii) any other option or right entitling the holder thereof to acquire a subject security, but only if the holder thereof reasonably believes that the person obliged to deliver the subject security upon exercise of such option or right owns and will continue to own the subject security from the time of any tender in reliance upon such option or right through the date on which such tender is accepted, rejected or withdrawn and, upon exercise of such option or right, will deliver the subject security within a period consistent with normal delivery times in the securities business.

(4) The term "offer" shall mean any tender for or request or invitation for, tenders of any security;

(5) The term "subject security" shall mean any security which is the subject of any offer;

(6) The term "tender" shall mean delivery of a subject security pursuant to an offer, causing such delivery to be made, guaranteeing delivery of a subject security pursuant to an offer, causing a guarantee of such delivery to be given by another person, or any other method by which acceptance of an offer by a tendering person may be made;

(7) The term "tendering person" shall mean the person making a tender or on whose behalf a tender is made; and

(8) The term "facilitating person" shall mean any person giving a guarantee that subject securities will be delivered to the person making an offer.

(b) It shall constitute a "manipulative or deceptive device or contrivance" and a "fraudulent, deceptive or manipulative act or practice" as those terms are used in Sections 10(b) and 14(e) of the Act, respectively, for any person acting alone or in concert with others, directly or indirectly, in connection with an offer for any subject security:

(1) To tender any subject security for his own account unless, from the time of such tender through either the last date on which tenders may be made pursuant to the offer or rejection or withdrawal of such tender (whichever shall first occur), he owns and will continue to own (i) the subject security and will deliver or cause to be delivered such security for the purpose of tender, to the person making the offer within the period specified in the offer, or (ii) an equivalent security and, upon the acceptance of his tender, will acquire the subject security by conversion, exchange or exercise of such equivalent security to the extent of such acceptance and, within the period specified in the offer, will deliver or cause to be delivered the subject security so acquired for the purpose of tender to the person making the offer;

(2) To tender any subject security on behalf of any tendering person unless he reasonably believes that such person is and will continue to be in compliance with subparagraph (1) of this paragraph (b);

(3) To guarantee delivery of any subject security for the purpose of facilitating a tender by or on behalf of any tendering person for such tendering person's own account unless the facilitating person, from the time of such guarantee through either the last date on which tenders may be made pursuant to the offer or rejection or withdrawal of the tendering person's tender (whichever shall first occur), (i) carries and continues to carry for such tendering person, a net long position in the subject securities (or in equivalent securities convertible into or exchangeable or exercisable to the amount of subject securities) at least equal to the amount of subject securities with respect to which the facilitating person has guaranteed delivery by the tendering person, and, (ii) has and continues to have in his possession or under his control an amount of subject securities (or equivalent securities convertible into or exchangeable or exerciseable for an amount of subject securities) at least equal to the aggregate amount of subject securities with respect to which such facilitating person has guaranteed delivery;

(4) To lend any subject security to any person unless the person lending such security reasonably believes that such loan is not for the purpose of facilitating a tender by the person borrowing such security for his own account; or

(5) Having tendered any subject security on behalf of another person, to fail to withdraw such tender in the event such person knows or should know, during the period withdrawal of such tender is permitted by the terms of the offer, that the person on whose behalf the tender was made is not in compliance with subparagraph (1) of this paragraph; or

(6) To effect a short sale of a subject security unless delivery of the subject security sold is made to the purchaser (or his agent) no later than the close of business on the last date on which tenders may be made pursuant to the offer;

(7) To effect, directly or indirectly, any transaction in subject securities or equivalent securities with the intent or purpose of evading the provisions of this rule.

(c) This rule shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms and conditions, as not constituting a manipulative or deceptive device or contrivance or a fraudulent, deceptive or manipulative act or practice comprehended within the purpose of this rule.

(Secs. 10(a), 10(b), 14(e), 23(a), 48 Stat. 891, 901; sec. 8, 49 Stat. 1379; sec. 3, 82 Stat. 455; sec. 5, 84 Stat. 1497; Sec. 18, 89 Stat. 155; (15 U.S.C. 78j(a), 78j(b), 78n(e), 78w(a)).)

The Commission hereby proposes for comment amendments to Rule 10b-4 pursuant to Sections 10(a), 10(b), 14(e) and 23(a) of the Act.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

NOVEMBER 9, 1977.

[FR Doc.77-33085 Filed 11-15-77;8:45 am]

[7708-01]

PENSION BENEFIT GUARANTY CORPORATION

[29 CFR Part 2617]

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Reporting and Notification Requirements for Reportable Events

AGENCY: Pension Benefit Guaranty Corp.

ACTION: Proposed rule.

SUMMARY: This proposed rule prescribes the reporting and notification requirements for reportable events imposed by the Employee Retirement Income Security Act of 1974 (the "Act"). The Act requires a plan administrator of any plan covered by the plan termination insurance provisions of the Act ("covered plan") to notify the Pension Benefit Guaranty Corp. (the "PBGC") within 30 days after he knows or has reason to know of the occurrence of certain events that may indicate a possible danger of plan termination. The PBGC is authorized to waive these reporting obligations and instead require notification of the event(s) to be included in the plan's annual report to the PBGC.

DATES: Comments by: January 30, 1978.

ADDRESSES: Comments should be addressed to the Office of the General Counsel, Pension Benefit Guaranty Corp., Suite 7200, 2020 K Street NW., Washington, D.C. 20006. Each person submitting comments should include his or her name and address, identify this notice and give reasons for any recommendations.

Copies of written comments will be available for examination in the Office of Communications of the Pension Benefit Guaranty Corp., Suite 7100, at the above address, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT:

David Weingarten, Staff Attorney, Office of the General Counsel, Pension Benefit Guaranty Corp., 2020 K Street NW., Washington, D.C. 20006, 202-254-3010.

SUPPLEMENTARY INFORMATION:

INTRODUCTION

Important to a satisfactory understanding of this part is an understanding

of the terms "employer" and "plan," and the difference between them.

Under section 4001(b) of the Act, all trades or businesses (whether or not incorporated) under common control, within the meaning of Part 2612 of this chapter, are considered to be a single employer for purposes of Title IV of the Act. This definition of the term "employer" is contained in proposed § 2617.2. (It should be noted that the term "employer", when used in certain sections of other Titles of the Act, does not necessarily have this meaning. For example, the term "employer", as used in the definition of plan sponsor in section 3(16)(B), is defined by section 3(5) not section 4001(b)).

Under proposed § 2617.2, there is one plan, (whether it be one single employer plan, multiple employer plan, or multiemployer plan), as opposed to a number of plans, only if, on a going concern basis, all of the plan assets are available to pay all participants' benefit entitlements. A plan will not fail to be one plan solely because:

1. The plan has two or more distinct benefit structures that apply either to the same or different groups of participants;

2. The plan has several plan documents;

3. Several employers, whether or not "affiliated" contribute to the plan;

4. The assets of the plan are invested in several trusts or annuity contracts;

5. The plan has purchased irrevocable commitments from an insurer to pay all or part of the participants' benefits; or

6. Separate accounting is maintained for purposes of cost allocation, but not for purposes of providing benefits under the plan.

This definition is consistent with the IRS definition of "single plan" contained in proposed Treas. Reg. § 1.414(1)-1(b)(1) (42 FR 33770, 33771, July 1, 1977).

Under the proposed definition of "plan", the PBGC would view a multiple employer plan—a plan to which more than one employer makes contributions, which does not meet the full statutory definition of a multiemployer plan—as a single plan if, on an on-going basis, all plan assets are available to satisfy all participants' benefits, even though the plan contains restrictions on its obligations to participants in the event their employer withdraws from the plan. However, such restrictions, depending upon how they apply, may be a violation of Title II's minimum vesting standards or section 414(1) of the Code.

A multiemployer plan will not fail to be one plan solely because it provides, in accordance with Code section 414(f)(1)(D) that "benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such plan."

In contrast, more than one plan exists if, on a going concern basis, a portion of the assets is not available to pay some of the benefits, irrespective of whether each plan has the same benefit structure or plan document or if all or part of the assets are involved in one trust.

The definition of plan contained in proposed § 2617.2 is the result of an exchange of correspondence with the IRS and the PBGC's desire that there be a uniform definition of the term "plan." Earlier, the PBGC had taken the position that there is one plan, as opposed to a number of plans, only if all of the plan assets are available to pay all participants' benefit entitlements, irrespective of any cessation of contributions to or withdrawal of participation from such plan by any employer. The PBGC invites specific comments from the public on the proposed definition of plan.

Reportable Events

General

The reporting requirements of section 4043 are intended to inform the PBGC of the occurrence of certain events that may result in plan termination and that may necessitate monitoring or termination by the PBGC of a covered plan. H.R. REP. No. 1280, 93d Cong., 2d Sess. 373 (1974). These requirements are designed to protect participants and the PBGC. The reportable events described in proposed §§ 2617.4–2617.11 are those set forth by Congress in paragraphs (b)(1)–(8) of section 4043 of the Act. Additionally, section 4043(b)(9) gives the PBGC authority to prescribe other reportable events. The PBGC proposes to establish three more reportable events, which are described in proposed §§ 2617.12, 2617.13 and 2617.14. Consistent with the Congressional purpose noted above, the definitions of the reportable events in proposed §§ 2617.4–2617.14 include only those situations that are indicative of plan or employer financial problems or possible need for plan termination.

The IRS and the Department of Labor (the "DOL") are required to notify the PBGC whenever certain events occur (Act, sections 4043 (c) and (d)). In addition, under some circumstances, the occurrence of certain events will have only a minimal impact on the plan, the employer, or the PBGC's potential liability. Generally, in such situations, the PBGC proposes to exercise its authority under § 4043(a) to waive the plan administrator's obligation to file a 30-day notice, i.e., to notify the PBGC within 30 days after he knows or has reason to know of the occurrence of a reportable event. Notification of these events will be made in the plan's annual report (proposed § 2617.3(a)(2)). This use of the PBGC's authority to waive the 30-day notice requirement, to the extent specified in this proposal, will reduce the plan administrator's reporting obligations and enable the PBGC to direct its primary attention only to those events that need to be reviewed on a priority basis.

Because, for example, the PBGC should receive timely notification from the IRS and/or the DOL of the following events, it is proposed that a plan administrator will not be required to notify the PBGC within 30 days after he knows or has reason to know about the occurrence of these events:

(1) IRS notice that a plan has ceased to be a plan described in (4021(a)(2) of the Act (4043(b)(1));

(2) DOL determination of non-compliance with Title I of the Act (section 4043(b)(1));

(3) IRS determination of a termination or partial termination within the meaning of (section 411(d)(3) of the Internal Revenue Code of 1954 section 4043(b)(4)); and

(4) Alternative method of compliance prescribed by the Secretary of Labor under section 110 of the Act (section 4043(b)(8)).

In addition, with respect to most other reportable events, a plan administrator will be required to file a 30-day notice with the PBGC only under certain circumstances. Finally, the PBGC has reserved the right, in any individual case, to waive the requirement that a 30-day notice be filed and to waive the filing of any of the information required to be submitted with the notice (proposed § 2617.3(f)).

It should be noted that the proposed waiver of the 30-day notice requirements as set forth herein, will not eliminate the need to file an annual report, as required by Part 2606 of this chapter. Furthermore, the public should expect that the form prescribed by Part 2606 of this chapter for filing an annual report will be revised to conform to this part.

Description of Reportable Events and 30-Day Filing Requirements

Proposed § 2617.4(a) provides that a reportable event occurs upon the determination by the IRS that a plan has ceased to be qualified or upon the determination by the DOL that a plan is not in compliance with Title I of the Act. However, under proposed § 2617.4(b), a 30-day notice need not be filed for these events, since the PBGC expects to receive information concerning these events from the IRS under section 4043(c)(1), and from the DOL pursuant to section 4043(d)(1).

A reportable event under proposed § 2617.5(a) occurs, generally, when an amendment to a plan is adopted that eliminates any type of retirement benefit or decreases or may decrease the amount of any accrued retirement benefit or retirement benefit that would accrue in the future to any participant or increases the age, service or other requirements for benefit entitlement. However, if a plan amendment changes the retirement age and/or form of the retirement benefit, the amount of the accrued retirement benefit (or the retirement benefit that would accrue in the future) provided by the plan immediately before the amendment must be converted to an actuarially equivalent amount of accrued retirement benefit (or retirement benefit that would accrue in the future) for the retirement age and form of the benefit under the amendment to determine

whether the adoption of the plan amendment has resulted in a reportable event under proposed § 2617.5(a). Examples of this event include a reduction in accrued benefits, a reduction in retirement benefits that would accrue in the future, or an increase in age or service requirements for vesting. A change in the actuarial factors used to compute optional forms of payment of retirement benefits is not a reportable event under proposed § 2617.5(a). In addition, an increase in the rate of interest on employee contributions is not a reportable event, if the retirement benefit has not been decreased. However, a change in the actuarial factors used to compute early retirement benefits that may result in a lower normal form of payment at any age is a reportable event under proposed § 2617.5(a). Also, a reportable event occurs under proposed § 2617.5(a) when a plan is amended to cease benefit accruals, perhaps as an alternative to termination. See generally, PBGC, "Guidelines on Voluntary Termination," Publication No. 503 (January, 1977).

A retirement benefit for purposes of proposed § 2617.5(a) is a benefit payable upon normal, early or disability retirement, other than a welfare benefit described in section 3(1) of the Act to a participant who leaves, or has left covered employment.

The 30-day notice requirement for this event does not apply unless the plan has at least 100 participants on the date an amendment is adopted (rather than its effective date), and the amendment decreases or may result in a decrease, with respect to more than 10 percent of plan participants, of more than 10 percent of the amount of the normal retirement benefit provided by employer contributions. (For purposes of this regulation only, a normal retirement benefit is defined as the benefit payable at the earliest age at which a participant is eligible for immediate commencement of full accrued retirement benefits under the plan and for which age and/or service are the only requirements.) Accordingly, no 30-day notice need be filed as a result of the adoption of an amendment that reduces early or disability retirement benefits only, or that reduces normal retirement benefits provided by employee contributions only. Further, the notice requirement is not applicable when the amendment is adopted to prevent the plan from violating the nondiscrimination rules under the Code.

The PBGC proposes to adopt this system of reporting, which requires a 30-day notice only for certain decreases or potential decreases in normal retirement benefits, because it believes that the most significant benefits from a Title IV perspective provided by most covered plans are normal retirement benefits. Thus, substantial decreases in the amount of such benefits provided by employer contributions generally will have the most significant impact on the plan. The adoption of an amendment that reduces normal retirement benefits by a small amount, that affects a limited number of participants, that is due solely to decreases in employee contributions, that is offset by increased employer contributions to certain other pension plans, or that reduces retirement benefits other than normal retirement benefits, would not appear to indicate a serious problem with the plan or the employer or a possible need for plan termination.

Proposed § 2617.6(a) provides that a reportable event occurs when the number of active participants is less than 80 percent of the number of such participants at the beginning of the plan year, or is less than 75 percent of the number of such participants at the beginning of the previous plan year. The purpose of reporting this event is to identify plans experiencing significant declines in covered employment since such declines may indicate employer economic problems. Thus, in single employer plans, the event is tied directly to declines in employment due to factors other than temporary or seasonal layoffs. An active participant in a single employer plan is defined in proposed § 2617.2 as an employee participating in the plan who is either receiving compensation for work performed, or who is on an authorized absence, i.e., a paid or unpaid temporary absence granted by an employer for noneconomic reasons, such as military service, vacation, jury duty, illness, or union functions. However, if an employee is not performing work for the employer for economic reasons, including layoff, strike, and voluntary or involuntary termination of employment, that employee is still considered to be an active participant if his absence from work has lasted or reasonably may be expected to last less than 30 days or is due to annually or periodically recurring reductions in employment (e.g., retooling or seasonal declines in demand for a product or supply of materials).

In a plan to which more than one employer contributes, the use of the concept of active employment as described above could create excessive administrative burdens. Consequently, an active participant in such a plan is defined in proposed § 2617.2 as a participant who currently is accruing benefits or earning or retaining credited service for purposes of vesting under the plan, i.e., has not incurred a break in service for vesting purposes for a period of one year or the period specified in the plan, whichever is longer.

A 30-day notice is required to be filed, in the event of a reduction in the number of active participants as described above, pursuant to proposed § 2617.6(b), for plans with 100 or more participants as of the beginning of the current or previous plan year. However, proposed § 2617.6(b) also contains a special rule whereby a single employer plan need not file a 30-day notice if the employer maintains more than one covered plan and there is not more than a 20 percent reduction since the begining of the current plan year (or a 25-percent reduction since the begining of the previous plan year) in the total number of active participants in all of the employer's covered plans. This rule eliminates detailed reporting of small reductions in total employment that would not appear to indicate employer economic problems.

Proposed § 2617.7(a) provides that a reportable event occurs when the Secretary of the Treasury determines that there has been a termination or partial termination of the plan within the meaning of section 411(d)(3) of the Code. As a practical matter, the PBGC does not expect to receive any notices that the Secretary of the Treasury has determined that there has been a termination, since an IRS regulation provides that a covered plan "* * * is considered terminated on a particular date if, as of that date—(i) the plan is voluntarily terminated * * *" under section 4041 of the Act, or (ii) the plan is involuntarily terminated by the PBGC under section 4042 of the Act. Treas. Reg. section 1.411(d)-2(c)(2) (42 FR 42318, 42339-40, August 23, 1977). Because, pursuant to section 4043(c)(1), the PBGC expects to be informed of an IRS determination of the partial termination of a plan, by the IRS, proposed section 2617.7(b) provides that non 30-day notice need be submitted concerning this event.

A reportable event occurs under proposed section 2617.8(a) when a plan fails to meet the minimum funding standards under section 412 of the Code or under section 302 of the Act. Even though the IRS and the DOL are required, pursuant to sections 4043(c)(1) and 4043(d)(1) of the Act, to notify the PBGC about the occurrence of this event, all plans must file a 30-day notice with the PBGC. Because the occurrence of this event may indicate serious plan and employer financial problems, the PBGC believes that the 30-day notice is necessary.

Proposed § 2617.9(a) provides that a reportable event occurs when a plan is unable to pay full promised benefits when due in the form prescribed by the plan for financial or other reasons. Generally, an event described in proposed § 2617.9(a) occurs when a plan currently has inadequate assets to pay full promised benefits as they come due, or when full promised benefits are not paid because of asset liquidity problems. Administrative delays or difficulties caused by, for example, the absence for fewer than two full benefit payment periods of the person authorized to make or approve benefit payments, or the need to verify participants' eligibility to receive benefits, will not result in a plan being considered unable to pay full promised benefits when due. Special rules are included in § 2617.9(b) for determining when a plan is unable to pay full promised benefits when due when the benefits are provided: (1) In a manner such that the plan is primarily and directly liable, e.g., an insurer has not undertaken the direct irrevocable obligation to pay all of the benefits, such as in a trusted or split-funded plan; or (2) solely through a group insurance con-

tract, e.g., a deposit administration contract or an immediate participation guarantee contract.

Proposed § 2617.9(b) requires all plans to file a 30-day notice for this event since the inability of a plan to meet its benefit commitments when due in the form prescribed by the plan indicates serious plan financial problems and is one of the statutory bases for action under section 4042.

Proposed § 2617.10(a) defines as a reportable event a plan distribution having a value of $10,000 or more to a participant who was a substantial owner within 60 months prior to the distribution, if the distribution is not a benefit payable on account of the death of the participant and if, immediately after the distribution, the plan has nonforfeitable benefits which are not funded. The term "distribution" includes a direct or indirect benefit payment in any form from a plan to a participant, including monthly annuity payments, a lump-sum payment, the purchase of an annuity, and a direct distribution of a plan asset other than cash. In determining whether this reportable event has occurred, all distributions within a 24-month period are to be treated as a single distribution and their values aggregated in order to compute the amount of the distribution. The occurrence of this event authorizes the PBGC to initiate involuntary termination proceedings under section 4042(a)(3) of the Act. However, a 30-day notice for this event need only be filed when there has been a distribution or distributions with a value of $10,000 or more, to a substantial owner within a 12-month period, all or a portion of which is attributable to a benefit which is in excess of the maximum guaranteeable benefit for substantial owners under Part 2609 of this chapter for the year in which it is made. Thus, proposed § 2617.10(d) requires a 30-day notice only for those large distributions which may have a significant impact on the PBGC's exposure, or which may be subject to recapture under section 4045 of the Act.

Proposed § 2617.11(a) provides, in part, that a reportable event occurs when a plan merges, consolidates or transfers its assets or liabilities under § 208 of the Act or § 414(1) of the Code. Even though section 4043(b)(8) of the Act does not include the phrase "or liabilities", Congress clearly intended such phrase to be included in the description of this event. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 374 (1974). Since the provisions of section 208 of the Act and section 414(1) of the Code are substantially identical, the PBGC believes that it is an appropriate interpretation of section 4043(b)(8) to include events under section 414(1) of the Code as well as section 208 of the Act. In addition, even if the PBGC interpreted section 4043(b)(8) not to include events under section 414(1) of the Code, the PBGC still could receive notification of such events simply by prescribing a reportable event under section 4043(b)(9) to cover Code section 414(1) events. Whether such a reportable event has occurred is dependent upon the DOL and the IRS delineation of the types of events that are within the meaning of section 208 of the Act and section 414(1) of the Code. A spinoff governed by Code section 414(1) will occur when an employer ceases contributions to a multiple employer plan, if the plan segregates the assets attributable to a withdrawing employer and limits the original plan's liability for the benefits of the participants who worked for that employer to that segregated portion of the fund. See definition of "plan" discussion, supra. A change in the funding agent or funding medium of the plan is not considered a reportable event under proposed § 2617.11(a).

In general, a 30-day notice is only required, pursuant to proposed § 2617.11(b), when one or more multiemployer plans (within the meaning of section 414(f) of the Code) merge or consolidate with or transfer (or receive) assets or liabilities to (or from any other plan, or when a single employer plan with 100 or more participants merges or consolidates with or transfers assets or liabilities to a plan maintained by a different employer (i.e., an employer who is not a member of the same group of trades or businesses under common control within the meaning of Part 2612 of this chapter). Proposed § 2617.11(b) contains a special rule under which a 30-day notice need not be filed if there is a transfer of assets or liabilities pursuant to a reciprocity or portability agreement, until the total of such asset or liability transfers during the plan year exceeds 3 percent of the value of the plan assets at any point during the plan year. When the 30-day notice is required to be filed in such a situation, the notice need only be submitted by the plan administrator of the plan transferring assets or assuming liabilities in excess of the 3 percent limit.

The 30-day notice for mergers, consolidations and transfers involving a multiemployer plan is necessary to enable the PBGC, pursuant to sections 208, 1015(1) and 1021(b) of the Act, to determine the extent to which these sections shall apply to multiemployer plans. With respect to mergers, consolidations and transfers involving single employer plans of different employers, a 30-day notice must be filed because the transfer to a different employer's plan may increase the PBGC's risk of loss if, for example, the statutory net worth of the second employer is lower than that of the first employer. This, of course, is not a problem when the same employer maintains all of the plans involved in the transaction. No 30-day notice need be filed for other occurrences covered by this reportable event because the PBGC expects to receive pertinent information from the IRS.

Proposed § 2617.11(a) also provides that a reportable event occurs when an alternative method of compliance with any of the reporting and disclosure requirements, under Part I of Title I of the Act, is prescribed by the Secretary of Labor under section 110 of the Act. Since the DOL is required to advise the PBGC when such an alternative method of compliance is prescribed and the PBGC expects to receive pertinent information concerning this event from the DOL, proposed § 2617.11(b) does not require the filing of a 30-day notice of this event.

As noted above, proposed §§ 2617.12, 2617.13 and 2617.14 contain reportable events prescribed by the PBGC pursuant to section 4043(b)(9) of the Act. Under proposed § 2617.12(a) a reportable event occurs when, with respect to a single employer plan, the employer maintaining the plan (assuming it is not a member of a group of trades or businesses under common control within the meaning of Part 2612 of this chapter) or, in the case of a single employer plan maintained by one or more members of such a group, any member of the group (whether or not contributing to the plan), is the subject of bankruptcy, insolvency, or similar proceedings or settlements of indebtedness (whether judicial or nonjudicial). Timely notification regarding the above-mentioned events is necessary for the PBGC to protect itself against potential increases in its exposure as a result of such events. Accordingly, proposed § 2617.12(b) requires a 30-day notice with respect to all such events.

Proposed § 2617.13(a) provides, generally, that a reportable event occurs when, with respect to a single employer plan, the employer maintaining the plan (assuming it is not a member of a group of trades or businesses under common control within the meaning of Part 2612 of this chapter) or, in the case of a single employer plan maintained by one or more members of such a group, any member of the group (whether or not contributing to the plan), is in the process of being completely liquidated or dissolved. A reportable event under proposed § 2617.13(a) occurs when dissolution proceedings are instituted or there is a dissolution, or, upon any transaction to implement the complete liquidation, whichever occurs first. Proposed §§ 2617.13 (b) and (c) contain special rules exempting from this event certain reorganizations specified in section 4062(d) of the Act and bankruptcy, insolvency or similar settlements under proposed § 2617.12(a). A 30-day notice is required for a reportable event under proposed § 2617.13(a).

Proposed § 2617.14 provides, generally, that a reportable occurs when, with respect to a single employer plan with 100 or more participants and with nonforfeitable benefits which are not funded, there is a transaction involving the assets of or an ownership interest in the plan sponsor and as a result the plan sponsor will be no longer a member of the same commonly controlled group, or, there will be or is a change of plan sponsor. A reportable event under proposed § 2617.14(a) occurs, for example, when a corporation maintaining a single employer plan for 100 of its employees at a facility, with nonforfeitable benefits which are not funded, executes an agreement to sell the assets of that facility to an unaffiliated

corporation that agrees to assume the plan. Note that in the preceding example, if there was no preliminary sale agreement, the reportable event would have occurred upon the consummation of the sale. Other "transactions" subject to proposed § 2617.14(a) include legally binding agreements whether or not written and changes in ownership that occur as a matter of law or through the exercise or lapse of preexisting rights. Proposed § 2617.14(a) is necessary because certain changes of plan sponsor and situations in which the plan sponsor will be or is no longer a member of the same commonly controlled group may seriously increase the PBGC's loss in the event of a subsequent plan termination. Accordingly, a 30-day notice is required for this event.

This event does not cover a change in corporate structure that involves a mere change in identity, form, or place of organization, however affected. Nor does it cover a situation in which there is a change in the plan sponsor but no change in the identity of the employer, as defined in proposed § 2617.2. Thus, proposed § 2617.14 does not apply if the plan sponsor after the transaction, is a member of the same group of trades or businesses under common control as the plan sponsor before the transaction. Proposed § 2617.14 contains a special rule under which no reportable event under proposed § 2617.14 occurs, for example, upon a sale where the seller's plan is to be merged or consolidated with a plan of the buyer, or, where assets or liabilities are transferred from the seller's plan to a plan of the buyer.

Report Form and Documentation Required

The plan administrator will be required to notify the PBGC of the occurrence of a reportable event for which a 30-day notice is required by filing Form PBGC-2, the form proposed to be prescribed by this part. Copies of the proposed form have been filed with and are available for inspection at the Office of the Federal Register. Additional copies are available upon request from the PBGC. This report form contains plan identification information, data on the number of participants, and check boxes for the type of event which occurred and the type of documentation submitted. Proposed § 2617.3(c) specifies the items a plan administrator will be required to submit in the notice with the report form. This information includes a copy of the current plan and all amendments adopted within the preceding five years, a copy of all documents under which the plan was established and is operated (e.g., the collective bargaining agreement, group insurance contract, trust agreement) and the two most recent actuarial valuations. Proposed § 2617.3(d) sets forth additional information that must be provided for certain events.

Optional Consolidated Filing

Although a notice generally will be required to be filed for each event described in this Part, proposed § 2617.3(h) permits the plan administrator to satisfy what otherwise might be multiple filing requirements by filing only one report form and one set of required documentation and information in certain situations.

Obligation of Employer

Section 4043(a) provides that "whenever an employer making contributions under a plan to which section 4021 applies knows or has reason to know that a reportable event has occurred, he shall notify the plan administrator immediately." This rule is contained in proposed § 2617.16.

In consideration of the foregoing, it is proposed to amend Chapter XXVI of Title 29, Code of Federal Regulations by adding a new Part 2617 to read as follows:

PART 2617—REPORTING AND NOTIFICATION REQUIREMENTS FOR REPORTABLE EVENTS

Sec.

Authority: Secs. 4002(b)(3), 4043, 4065, Pub. L. 93-406, 88 Stat. 1004, 1024-25, 1932 (29 U.S.C. 1302(b)(3), 1343, 1365).

§ 2617.1 Purpose and scope.

(a) The purpose of this part is to prescribe the specific reporting and notification requirements imposed by section 4043 of the Act.

(b) This part applies to all covered plans.

§ 2617.2 Definitions.

For purposes of this part (unless otherwise required by the context):

"Act" means the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq. (Supp. V, 1975)).

"Active participant" means:

(a) With respect to a single employer plan, a participant who:

(1) Is receiving compensation for work performed;

(2) Is on authorized absence;

(3) Is absent from work for a period of time which has lasted or reasonably may be expected to last less than 30 days; or

(4) Is absent from work due to annual or other periodic recurring reductions in employment.

(b) With respect to a plan to which more than one employer contributes, a participant who currently is accruing benefits or retaining or earning credited service for purposes of vesting under the plan, i.e., a participant who has not incurred a break in service for vesting purposes for a period of one year or the period specified in the plan, whichever is longer.

"Authorized absence" means a paid or unpaid temporary absence granted by an employer for noneconomic reasons.

"Code" means the Internal Revenue Code of 1954, as amended.

"Commonly controlled group" means a group of trades or businesses (whether or not incorporated) under common control within the meaning of Part 2612 of this chapter.

"Covered plan" means a plan to which Section 4021 of the Act applies.

"Distribution" means direct or indirect benefit payments made in any form from a plan to a participant including, but not limited to, monthly annuity payments, a lump-sum payment or a direct distribution of a plan asset other than cash. The receipt of an irrevocable commitment to pay benefits or their equivalent, made by an insurer pursuant to an insurance contract purchased with funds contributed to or under a plan, shall be considered to be a distribution on the effective date of the insurer's irrevocable commitment: *Provided, however,* That any cash payments made by an insurer pursuant to an irrevocable commitment shall not be considered a "distribution". A cash distribution shall be considered to be a distribution on the date it is received by the participant. The date of all other distributions shall be when the plan relinquishes control over the assets transferred directly or indirectly to the participant.

"Employer" means all trades or businesses (whether or not incorporated) under common control within the meaning of Part 2612 of this chapter.

"Insurance contract" means a valid written agreement pursuant to which an insurer agrees to perform services including the payment of specified benefits in return for the payment of premiums or other consideration.

"Insurer" means a company authorized to do business as an insurance carrier under the laws of a State or the District of Columbia.

"Irrevocable commitment" means an obligation by an insurer to pay benefits to a named plan participant or surviving beneficiary, which cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and which is legally enforceable by the participant or beneficiary.

"IRS" means the Internal Revenue Service.

"Money purchase plan" means an individual account plan, as defined in section 3(34) of the Act, in which the employer's contributions are fixed, often as a percentage of compensation.

"Multiemployer plan" means a multiemployer plan as defined in section 414(f) of the Code.

"Multiple employer plan" means a plan, other than a multiemployer plan, under which more than one employer makes contributions.

"Nonforfeitable benefits which are not funded" means when the value of nonforfeitable benefits as defined in § 2605.6 of this chapter exceeds the value of plan assets (valuing benefits in accordance with reasonable actuarial assumptions and valuing plan assets in accordance with the valuation standards contained in Part 2611 of this chapter). For this purpose, reasonable actuarial assumptions are the actuarial assumptions used by the PBGC, the actuarial assumptions used by the plan for purposes of § 302 of the Act, or the purchase price of an irrevocable commitment.

"Normal retirement benefit" means the benefit payable at the earliest age at which a participant is eligible for immediate commencement of full accrued retirement benefits under the plan and for which age and/or service are the only requirements.

"Participant" means:

(a) Any individual currently accruing benefits or retaining or earning credited service under the plan (not including non-vested former employees who have incurred a break in service of the greater of one (1) year or the break in service period specified in the plan);

(b) Former employees with vested rights to immediate or deferred benefits or retirees receiving or eligible to receive benefits from the plan, other than former employees or retirees to whom an insurance company has made irrevocable commitments to pay the benefits to which they are entitled under the plan;

(c) Decreased participants whose survivors are receiving benefits from the plan; or

(d) Any other individuals defined as participants under the terms of the plan.

"Plan" means one plan (whether it be a single employer, multiemployer or multiple employer plan), as opposed to a number of plans, only if, on a going concern basis, all of the plan assets are available to pay all participants' benefit entitlements.

"Plan administrator" means the plan administrator, as defined in section 3(16) of the Act, or a duly authorized representative of such person. For this purpose, the term "employer" as used in section 3(16), is defined in section 3(5) of the Act.

"Plan to which more than one employer contributes" means a multiple employer plan or a multiemployer plan.

"Plan year" means the calendar, policy or fiscal year on which the records of the plan are kept.

"Post-funding rider" means a provision in an insurance contract that authorizes the insurer to pay full benefits to a retired participant while the participant's irrevocable annuity from the insurer is being purchased.

"Retirement benefit" means a benefit payable upon normal, early or disability retirement, other than a welfare benefit described in section 3(1) of the Act, to a participant who leaves or has left covered employment.

"Single employer plan" means a plan to which one employer, as defined above, contributes.

"Substantial owner" means an individual who within the 60 months preceding the date on which the determination is made:

(a) Owns or owned the entire interest in an unincorporated trade or business;

(b) In the case of a partnership, is or was a partner who owns or owned, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership; or

(c) In the case of a corporation, owns or owned, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation. For this purpose, the constructive ownership rules of section 1563(e) of the Code shall apply (determined without regard to section 1563(e)(3)(C)).

"PBGC" means the Pension Benefit Guaranty Corp.

"Title IV" means Title IV of the Act.

§ 2617.3 Requirement of notice.

(a) *Obligation to file.* Except as provided in paragraph (a)(2) of this section, the plan administrator shall file with the PBGC a notice of any and all reportable events described in §§ 2617.4–2617.14, occurring on or before a Notice of Intent to Terminate is filed in accordance with 29 CFR Part 2604.

(1) *Filing by plan administrator's representative.* A notice submitted pursuant to this section by a plan administrator's duly authorized representative, other than an attorney at law, shall be accompanied by a notarized power of attorney, signed by the plan administrator, which authorizes the said representative to sign and submit such a notice and, if desired, to act on behalf of the plan administrator in connection with the notice.

(2) *Waiver of notice of reportable event.* A notice of a reportable event is not required when filing of the 30-day notice is expressly waived by §§ 2617.4–2617.14 or when the PBGC waives the filing requirement pursuant to paragraph (f) of this section; however, the plan administrator shall report the occurrence of the event in the annual report filed pursuant to Part 2606 of this chapter.

(b) *When to file.* A notice of a reportable event, unless expressly waived by this Part, shall be filed no later than 30 days after the plan administrator knows or has reason to know such an event has occurred.

(c) *Contents of notice—General.* Each notice required to be submitted under this section shall be filed on the form prescribed by this part, in accordance with the instructions therein, and shall contain the information listed in this paragraph, and, when applicable, the information specified in paragraph (d) of this section. The response to each numbered item shall be identified by item number. If any requested information is included in an IRS form or submission attached to the notice, that information need not be repeated in the body of the notice. Instead, the information may be incorporated by reference to the number, date, and page or pages of the IRS form or submission where it appears. Each document required to be filed with the PBGC shall contain, if available, an adoption and effective date and an executed signature page. Each such document that does not contain an adoption or effective date shall be accompanied by a statement containing the missing information. Any required documentation previously filed with the PBGC need not be refiled, but may be incorporated by reference to the previous submission. Each notice shall contain:

(1) A copy of the current plan, i.e., a copy of the last restatement of the plan and all subsequent amendments;

(2) A copy of all amendments to the plan, adopted or effective within the 5-year period preceding the event;

(3) A copy of the document or documents establishing the plan;

(4) A copy (or copies) of any trust agreement providing for management of the assets of the plan, its administration, or the payment of benefits under the plan or any group insurance contracts;

(5) The name, address, and telephone number of each labor organization (if any) that represents plan participants and/or negotiates over matters relating to the plan, the name and title of the principal officer (or officers) of each such organization and of a labor organization of which it is a subordinate body;

(6) A complete copy of the most recent collective bargaining agreement (if any) that contains provisions relating to the plan;

(7) Copies of the two most recent actuarial statements and opinions (if any) relating to the plan;

(8) A statement of any material change in the liabilities of the plan occurring after the date of the later of the two actuarial statements referred to in subparagraph (7) of this paragraph; and

(9) Complete copies of any letters of determination issued by the IRS relating to the establishment of the plan, any disqualification of the plan and the most recent subsequent requalification.

(d) *Contents of notice—additional information.* Each notice filed with respect to the following events shall contain, in addition to the information required by paragraph (c) of this section, the information listed below:

(1) *A § 2617.5(a) event.* The percentage decrease in normal retirement benefits, and the percentage of participants affected.

(2) *A § 2617.6(a) event.* For all plans, as of the beginning of the immediately

preceding plan year and as of the date of the event, the total number of participants currently accruing benefits or retaining or earning credited service for purposes of vesting under the plan, such participants with fully vested rights, such participants with partially vested rights, such participants without vested rights, retired participants receiving benefits, former employees with vested rights, and deceased participants whose beneficiaries are receiving or entitled to receive benefits. For single employer plans, as of the beginning of the current and immediately preceding plan years and the date of the event, the number of active participants.

(3) *A § 2617.8(a) event.* A statement of the current funding standard account, or its alternative, showing the balance at the beginning of the plan year and the charges and credits to the account for the plan year that are required under section 302 of the Act and section 412 of the Code.

(4) *A § 2617.9*(a) *event.* The reason(s) why the plan is unable to pay benefits, the amount of the benefits due, the normal date of benefit payment, the amount and date of the last payment, and the value of plan assets as determined consistent with the evaluation standards contained in Part 2611 of this chapter.

(5) *A § 2617.10(a) event.* The amount and form of the distribution, the total value of nonforfeitable benefits which are not funded (separately stating the total amount of nonforfeitable benefits and of plan assets), the actuarial assumptions used to value benefits and whether an indemnity agreement has been entered into between the participant receiving the distribution and the plan trustee, concerning lump sum distributions to the 25 highest paid employees of the benefits subject to the early termination restrictions of Treas. Reg. § 1.401–4(c).

(6) *A § 2617.11(a) event.* A copy of Form 5310 and the actuarial data submitted to the IRS.

(7) *A § 2617.12*(a) *event.* Copy of papers filed in relevant proceedings, e.g., bankruptcy petition and supporting schedules, or other similar documents, showing name of court date of filing, docket number, type of proceeding and names, addresses and telephone numbers of attorneys involved. The last date for filing claims, if known, and the name, address and telephone number of any trustee or receiver of the employer.

(8) *A § 2617.14(a) event.* If there is a change of plan sponsor, the name, address, telephone number, and employer identification number (EIN) of the new plan sponsor, and the name, address, telephone number, and employer identification number (EIN) of each member of the commonly controlled group of the former plan sponsor, and of the new plan sponsor. If there is no change of plan sponsor but the plan sponsor is no longer a member of the same commonly controlled group, the name, address and telephone number of each member of the plan sponsor's former group, and, the plan sponsor's new group. The total value of nonforfeitable benefits which are not funded (separately stating the total amount of nonforfeitable benefits and of plan assets), and the actuarial assumptions used to value benefits.

(e) *Effect of failure to file.* Except as provided in paragraph (f) of this section, failure to file a notice required by this section or failure to include all information required in the notice constitutes a violation of Title IV of the Act.

(f) *Waiver of obligation to file.* The PBGC may, in any case, waive the requirement imposed by § 2617.3(a) of this section that a notice be filed with respect to the occurrence of any event described in §§ 2617.4–2617.14 and also may waive the filing of any information required to be submitted by this section.

(g) *Requests for additional information.* The PBGC may, in any case, request the submission of additional information.

(h) *Optional consolidated filing.* A single notice may be filed with respect to the occurrence of more than one event set forth in paragraph (a) of this section or by more than one plan administrator required to file a notice pursuant to paragraph (a) of this section in the situations described in paragraphs (h) (1) and (2) of this section.

(1) More than one event for which a notice is required by this section has occurred and the plan administrator intends to give the PBGC simultaneous notification of the events.

(2) In the case of an event described in §§ 2617.11 or 2617.12, all plan administrators who are required to file a notice pursuant to this section sign the same notice.

§ 2617.4 Tax disqualification or Title I noncompliance.

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury issues notice that a plan has ceased to be a plan as described in section 4021(a)(2) of the Act, or when the Secretary of Labor determines that the plan is not in compliance with Title I of the Act.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *waived* for the events described in this section.

§ 2617.5 Amendment decreasing benefits payable.

(a) *Reportable event.* A reportable event occurs when an amendment to a plan is adopted if, under the amendment, the retirement benefit payable with respect to any participant may be decreased.

(1) Except as provided in paragraph (a)(2) of this section, a decrease in the retirement benefit payable with respect to any participant includes the elimination of any type of retirement benefit, a decrease or potential decrease in the amount of any accured retirement benefit or the retirement benefit that would accure in the future, and an increase in the age, service or other requirements for benefit entitlement.

(2) A plan amendment will not be considered to have decreased the retirement benefit payable with respect to any participant if the amendment changes the retirement age and/or the form of the retirement benefit, and the actuarially equivalent amount of the accured retirement benefit or the retirement benefit that would accure in the future immediately before the amendment does not exceed the amount of the accured retirement benefit or the retirement benefit that would accure in the future for the retirement age and form of the benefit provided by the plan after the amendment, computed in accordance with paragraph (d) of this section.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is waived for the event described in this section, *unless*:

(1) The plan has 100 or more participants as of the date the amendment is adopted;

(2) The amendment decreases or may decrease the amount of the normal retirement benefit (computed in accordance with the provisions of paragraph (c) of this section, where applicable) provided by employer contributions by more than 10 percent for more than 10 percent of plan participants; and

(3) The amendment is not adopted in order to avoid or to correct discrimination prohibited by the Code.

(c) In computing the decrease in the amount of the normal retirement benefit for purposes of paragraph (b)(2) of this section, the following rules shall apply:

(1) When a plan amendment changes the normal retirement age and/or the form of the benefit, the decrease, if any, in the amount of the normal retirement benefit shall be computed by converting the amount of the normal retirement benefit provided by the plan immediately before the amendment to the actuarially equivalent amount of the benefit for the normal retirement age and form of benefit after the amendment, computed in accordance with paragraph (d) of this section, and subtracting the amount of the normal retirement benefit after the amendment from the amount of the actuarially equivalent normal retirement benefit immediately before the amendment.

(2) When a decrease in the amount of the normal retirement benefit provided by employer contributions with respect to 10 percent or more of the plan participants is accompanied by an increase for such participants in the amount of the normal retirement benefit provided by the same employer's contributions to a second covered plan, or to a money purchase plan, the increase in the amount of the projected normal retirement benefit under the second plan shall be deducted from the amount of the decrease in the normal retirement benefit provided under the first plan. The increase in the projected normal retirement benefit under the money purchase plan shall be determined by using the interest and

other appropriate assumptions of the covered plan.

(d) For purposes of this section, in order to compare the amount of the retirement benefit provided by a plan after a plan amendment that changes the retirement age and/or form of the benefit with the amount of the retirement benefit provided by the plan before the amendment, convert the amount of the retirement benefit provided by the plan immediately before the amendment to the actuarially equivalent amount of the benefit for the retirement age and form of the benefit under the amendment using the applicable conversion factors prescribed by the plan. If no such factors are prescribed by the plan, the applicable conversion factors prescribed by Part 2609 of this chapter for computing maximum guaranteable benefits shall be used.

§ 2617.6 Active participant reduction.

(a) *Reportable event.* A reportable event will occur when the number of active participants is less than 80 percent of the number of such participants at the beginning of the plan year, or is less than 75 percent of the number of such participants at the beginning of the previous plan year.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is waived for the event described in this section, *unless:*

(1) The plan has 100 or more participants as of the beginning of the current or previous plan year; or

(2) With respect to a single employer plan, the employer maintains one or more other covered plans and the total number of active participants covered by all such plans as of the date of the event is less than 80 percent of the total number of active participants in all such plans determined as of the beginning of each plan's current year, or 75 percent of the sum of the number of active participants in each such plan determined as of the beginning of each plan's previous plan year.

§ 2617.7 Termination or partial termination.

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury determines that there has been a termination or partial termination of the plan within the meaning of section 411(d)(3) of the Code.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *waived* for the events described in this section.

§ 2617.8 Failure to meet minimum funding standards.

(a) *Reportable event.* A reportable event occurs when the plan fails to meet the minimum funding standards under § 412 of the Code or under § 302 of the Act.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *not* waived for the event described in this section.

§ 2617.9 Inability to pay benefits when due.

(a) *Reportable event.* Except as provided in paragraph (c) of this section, a reportable event occurs when a plan is unable to pay benefits thereunder when due. A plan is unable to pay benefits thereunder when due if the plan asserts currently are inadequate to pay full promised benefits when due in the form prescribed under the terms of the plan (as described in paragraph (b) of this section) *or*, if the plan assets are sufficient to pay such benefits but, the plan, as a practical matter, is unable to do so.

(b) For purposes of § 2617.9, a plan is unable to pay full promised benefits when due if all participants in pay status or entering pay status do not receive the full promised benefits to which they are entitled under the plan because:

(1) The plan does not pay the full monthly or periodic benefit for which it is primarily and directly liable;

(2) An insurer from which the plan has purchased a group insurance contract that does not contain a post-funding rider is unable to issue an irrevocable commitment to pay the full benefit to which a participant is entitled under the plan because the amounts held under the contract are not adequate to cover the cost of the commitment; or

(3) An insurer from which the plan has purchased a group insurance contract that contains a post-funding rider does not pay the full monthly or periodic benefit to which a participant is entitled under the plan because the amounts held under the contract are not adequate to support such payments.

(c) A plan will not be considered to be unable to pay benefits thereunder when due if its inability to pay benefits is caused solely by administrative delays or difficulties, including, but not limited to, verification of participants' eligibility to receive benefits or the absence for fewer than two full benefit payment periods of the person authorized to make or approve benefit payments.

(d) *Waiver.* The 30-day notice requirement in § 2617.3(a) is *not* waived for the event described in this section.

§ 2617.10 Distribution to a substantial owner.

(a) *Reportable event.* A reportable event occurs when there is a distribution, valued in accordance with paragraph (b) of this section, under the plan to a participant who is a substantial owner if:

(1) Such distribution has a value of $10,000 or more;

(2) Such distribution is not made by reason of the death of the participant; and

(3) Immediately after the distribution, the plan has nonforfeitable benefits which are not funded.

(b) *Valuation of distribution.* A distribution described in paragraphs (a) or (d) of this section shall be valued in accordance with the provisions of this paragraph, except that paragraph (b)(iv) of this section does not apply to the valuation of a distribution described in paragraph (d) of this section.

(1) The value of a distribution shall be determined as of its date.

(2) The value of a distribution, other than an insurer's irrevocable commitment, equals the sum of the cash amounts actually received by the participant and the fair market value determined in accordance with Subpart B of Part 2611 of this chapter as of the distribution date, of any assets distributed in a form other than cash.

(3) The value of an insurer's irrevocable commitment is the value, determined in accordance with reasonable actuarial assumptions, of the benefits payable pursuant to that irrevocable commitment. For this purpose, reasonable actuarial assumptions are the actuarial assumptions used by the PBGC, the actuarial assumptions used by the plan for purposes of section 302 of the Act, or the purchase price of the irrevocable commitment.

(4) The value of all distributions to a participant within any 24-month period shall be aggregated to determine whether there has been a distribution with a value of $10,000 or more.

(c) *Determination date.* The determination of whether a participant is a substantial owner is made on the date when there has been a distribution or distributions with a total value of $10,000 or more.

(d) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *waived* for the event described in this section, *unless:*

(1) A plan makes a distribution or a series of distributions within a 12-month period to a substantial owner having a total value of $10,000 or more; and

(2) A distribution or a series of distributions, in whole or part, is attributable to a benefit that exceeds the value of the maximum guaranteeable benefit for a substantial owner determined under § 2609.7 of this chapter for the year in which the distribution was made.

§ 2617.11 Plan merger, consolidation or transfer or alternative compliance with reporting and disclosure requirements of Title I.

(a) *Reportable event.* A reportable event occurs when a plan merges, consolidates or transfers its assets or liabilities under section 208 of the Act or section 414(1) of the Code, or when an alternative method of compliance is prescribed by the Secretary of Labor under section 110 of the Act.

(b) *Waiver.* Except as provided in paragraphs (b)(1) and (b)(2) of this section, the notice requirement contained in § 2617.3(a) is waived for the events described in this section.

(1) The notice requirement contained in § 2617.3(a) is not waived if the plan merger, consolidation or transfer of assets or liabilities involves one or more multiemployer plans, *or* the plan is a single employer plan with 100 or more participants and it merges or consolidates with or transfers its assets or lia-

bilities to a single employer plan maintained by a different employer.

(2) *Special rule for transfers of assets or liabilities.* Paragraph (b)(1) of this section does not apply in the case of transfers of assets or liabilities pursuant to reciprocity or portability agreements until the sum of the assets transferred from the plan or the liabilities assumed by the plan during the plan year pursuant to such agreements exceeds three percent of the value of the plan assets, determined in accordance with the valuation standards contained in Part 2611 of this chapter, on any date during the plan year. When paragraph (b)(1) applies to such transfers, the notice need only be submitted by the plan administrator of the plan transferring assets or assuming liabilities in excess of the three percent limit.

§ 2617.12 Bankruptcy, insolvency or similar settlements.

(a) *Reportable event.* A reportable event occurs with respect to a single employer plan, when the employer or any member of the commonly controlled group that is treated as the employer whether or not contributing to the plan:

(1) Commences a case under the Bankruptcy Act, 11 U.S.C. 1 et seq., or has a case commenced against it;

(2) Commences or has commenced against it, any other type of insolvency proceeding (including, but not limited to the appointment of a receiver);

(3) Commences, or has commenced against it, a proceeding to effect a composition, extension or settlement with creditors;

(4) Executes a general assignment for the benefit of creditors; or

(5) Undertakes to effect any other nonjudicial composition, extension or settlement with creditors.

(b) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *not* waived for the event described in this section.

§ 2617.13 Liquidation or dissolution.

(a) *Reportable event.* A reportable event occurs with respect to a single employer plan, when the employer or any member of the commonly controlled group that is treated as the employer whether or not contributing to the plan:

(1) Is involved in any transaction to implement its complete liquidation; or

(2) Institutes or has instituted against it a proceeding to be dissolved, or is dissolved, whichever occurs first.

(b) *Reorganizations described in § 4062(d).* This section does not apply if there is or will be any one of the reorganizations described in section 4062 (d).

(c) *Bankruptcy, insolvency or similar settlements.* This section does not apply to a bankruptcy, insolvency or similar settlements under § 2617.12(a).

(d) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *not* waived for the event described in this section.

§ 2617.14 Change in employer-sponsor of single employer plan.

(a) *Reportable event.* Except as provided in paragraphs (b) and (c) of this section, a reportable event occurs with respect to a single employer plan that has 100 or more participants and nonforfeitable benefits which are not funded when, as a result of any transaction involving the assets of the plan sponsor or an ownership interest in the plan sponsor, including a legally binding agreement to sell or, in the absence of an agreement to sell, a sale:

(1) The plan sponsor will be or is no longer a member of the same commonly controlled group; or

(2) There will be or is a change of plan sponsor.

(b) *Certain reorganizations and transactions within commonly controlled group.* This section does not apply if, as a result of any transaction described in paragraph (a)(2) of this section, there is a reorganization described in § 4062 (d)(1), or, the employer liable to the PBGC before the transaction.

(c) *Plan merger, consolidation or transfer.* This section does not apply to a plan merger, consolidation or transfer of assets or liabilities under § 2617.11(a).

(d) *Waiver.* The 30-day notice requirement contained in § 2617.3(a) is *not* waived for the event described in this section.

§ 2617.15 Obligation of employer.

Whenever an employer making contributions under a covered plan knows or has reason to know that a reportable event has occurred, he shall notify the plan administrator immediately.

§ 2617.16 Form.

The form prescribed by this part is PBGC–2.

§ 2617.17 Date of filing.

Any notice or document required to be filed under the provisions of this part shall be deemed to have been filed on the date on which it is received by the PBGC.

§ 2617.18 Computation of time.

In computing any period of time prescribed or allowed by the rules of this part, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

§ 2617.19 Mailing address.

A notice or supplemental information required to be filed with the PBGC under the provisions of this Part may be submitted by mail or by hand to the Office of Program Operations, Pension Benefit Guaranty Corp., Suite 5200, 2020 K Street NW., Washington, D.C. 20006.

APPENDIX A—EXAMPLES

1. The following examples illustrate the application of § 2617.6; *assume, for these examples, that all employees are "active participants"*:

(A) Plans A, B and C are calendar year plans maintained by three unaffiliated employers. On January 1, 1975, each of the plans covered 500 employees. Through February 28, 1975, the following changes in employment occurred under each of the plans:

Plan	Total employees covered on Jan. 1, 1975	Separated from employment Jan. 1, 1975 to Feb. 2, 1975	New plan entrants and reemployed participants	Employees covered on Feb. 28, 1975	As a percent total Jan. 1, 1975
A	500	150	0	350	70
B	500	150	100	450	90
C	500	200	120	420	84

A reportable event under § 2617.6(a) would have occurred with respect to Plan A on February 28, 1975, since the number of active employees under the plan was 70 percent of the number at the beginning of the plan year (350÷500). Plans B and C did not incur a reportable event under § 2617.6(a) because although more than 20 percent of the employees on January 1, 1975 were separated from employment, the number on February 28, 1975 exceeded 80 percent of the number at the beginning of the plan year because of recalls and new entrants.

(B) Employer A has two covered plans, an hourly plan and a salaried plan, both of which are calendar year plans. The following table shows the number of employees covered by each of the plans on January 1, 1975, and changes in employment as of February 28, 1975:

Plan	Total employees covered on Jan. 1, 1975	Separated from employment Jan. 1, 1975 to Feb. 28, 1975	Employees covered on Feb. 28, 1975	As a percent of total Jan. 1, 1975
Hourly	1,000	100	900	90
Salaried	100	40	60	60
Total	1,100	140	960	87

Although there has been a more than 20 percent reduction in employment under the salaried plan, a 30-day notice described in § 2617.3(a) would not be required because the number of employees covered by *all* of the employer's covered plans is more than 80 percent of the number at the beginning of each plan's plan year (960÷1,100). However, a reportable event described in § 2617.6 (a) would have occurred with respect to the salaried plan, and so the plan administrator must include that event in the plan's annual report.

(C) Same situation as in (B), except that the number of employees under the hourly plan on February 28, 1975 was 750. In this case, both plans would have to file a 30-day notice described in § 2617.13(a) since each had a more than 20 percent reduction and, in addition, the number of employees covered by all of the employer's covered plans is less than 80 percent of the number at the beginning of each plan's plan year (810÷1,100)).

2. The following examples illustrate the application of § 2617.10:

(A) Assume that a covered plan has nonforfeitable benefits which are not funded, and that benefits have not been increased by amendment. A substantial owner with 35 years participation in the plan, and average earnings of $24,000 in his highest five consecutive years, retires on October 1, 1975 at age 65 and receives a benefit in the form of a life annuity of $850 per month or $10,200 per year. An event described in § 2617.10(a) will occur when the 12th monthly payment is made. However, the plan administrator, pursuant to § 2617.10(b), would not be required to file a notice described in § 2617.3(a) because, although the sum of distribution in a 12-month period exceeds $10,000, no portion of the distribution was for non-guaranteed benefits since:

(1) The $850 per month benefit is less than the maximum insurance amount for 1976 (the lesser of

(a) $869—($750 × $15,300/$13,200—or (b) $24,000/12); and

(2) The substantial owner was an active participant for at least 30 years.

(B) Same situation as in (A), except that the substantial owner has 20 years of participation at retirement. In this case, the plan administrator, pursuant to § 2617.10(b), would be required to file a 30-day notice described in § 2617.3(a) after 12 payments because, although the monthly benefit of $850 does not exceed the applicable maximum guaranteeable benefit, it does exceed the value of guaranteed benefits. In this example, the participant's guaranteed benefits are only $567 per month ($850 × 20/30).

Issued in Washington, D.C., this 10th day of November 1977.

RAY MARSHALL,
Chairman, Board of Directors,
Pension Benefit Guaranty Corp.

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this Notice of Proposed Rulemaking.

HENRY ROSE,
Secretary, Pension Benefit
Guaranty Corp.

[FR Doc.77-33024 Filed 11-15-77;8:45 am]

[4310-68]

DEPARTMENT OF THE INTERIOR

Mining Enforcement and Safety Administration

[30 CFR Parts 11, 70, 71, 75, 90]

"RESPIRABLE DUST"

Coal Mine Health Standards and Redefinition

AGENCY: Department of the Interior, Mining Enforcement and Safety Administration (MESA).

ACTION: Proposed Rules.

SUMMARY: The proposed amendments will: (1) Revise standards for silica dust and other airborne contaminants to conform with improved standards recently developed by the National Institute for Occupational Safety and Health, Center for Disease Control, Public Health Service, and recommended by the American Conference of Governmental Industrial Hygienists; (2) provide for increased training in the maintenance and calibration of sampling equipment and in the collection of samples of respirable coal mine dust and other airborne contaminants; (3) substitute area sampling for periodic sampling of miners working in areas not directly associated with removal of coal from its seam; (4) revise sampling schedules and procedures to remove ambiguities and extraneous requirements; and (5) revise the definition of respirable dust to conform with section 202(e) of the Federal Coal Mine Health and Safety Act of 1969.

DATES: Comments, suggestions, objections, and requests for hearing on such objections, must be received by December 16, 1977.

ADDRESS: Comments, suggestions. objections, and requests for hearing on such objections should be sent to: The Assistant Administrator. Coal Mine Health and Safety. Mining Enforcement and Safety Administration, Department of the Interior, room 818, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203.

FOR FURTHER INFORMATION CONTACT:

Joseph Lamonica, Chief, Division of Health, Coal Mine Health and Safety, Mining Enforcement and Safety Administration, room 830, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203, 703-235-1358.

SUPPLEMENTARY INFORMATION: The Secretary of the Interior, under section 101(d) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 811(d)), has authority to publish proposed mandatory health standards which have been developed and transmitted to him by the Secretary of Health, Education, and Welfare. Based on that authority, it is proposed that Part 70, Title 30, Code of Federal Regulations, be amended as set forth below.

Under 30 CFR 70.250, respirable coal mine dust samples are presently collected at periodic intervals from the mine atmosphere to which each individual underground coal miner is exposed. Experience has shown that it is difficult to track individual miners in a highly mobile work situation. Further, except in cases where samples were sometimes helpful in indicating those occupations which might incur greater exposure to respirable coal mine dust, records of individual exposures have not served to increase the protection afforded miners.

It is proposed that the present individual sampling requirements be replaced with an area sampling concept, except for the miner whose medical examinations show evidence of the development of pneumoconiosis and who elects to transfer to a less dusty occupation. The area samples would be collected at locations designated in the mine operator's MESA-approved respirable dust control plan and would include areas such as haulageways and dumping points. Individual miners would not be required to wear the coal mine dust personal samplers used to determine area dust concentrations. Notices of violation would be issued when area samples establish excessive concentrations of respirable coal mine dust.

Provisions for the maintenance of sampling devices have been added. The proposed amendments also would require sampling devices to be calibrated by a certified person. The certified person must, among other requirements, complete a MESA program of instruction in maintenance and calibration of dust sampling equipment and pass a MESA written examination at least every 2 years. These new provisions are intended to ensure greater reliability and accuracy in the sampling of contaminants. Procedures would be established for a qualified person to inspect sampling pumps between the first and second hours of operation underground to assure proper operation. The qualified person would also inspect sampling pumps during the last hour of operation for the purpose of voiding samples if the sampling pump has not been maintained at a proper flow rate.

The proposed regulations would reduce the standards for respirable dust when free silica is present to 0.07 milligram of free silica per cubic meter of air, the standard recommended by the National Institute for Occupational Safety and Health (NIOSH).

Standards for airborne contaminants, other than respirable coal mine dust, carbon dioxide, and free silica, are now contained in 30 CFR 75.301-2. The proposal would transfer the standard for these airborne contaminants from Part 75, which deals mainly with safety related issues, to Part 70. The existing standards refer to threshold limit values specified by the American Conference of Governmental Industrial Hygienist (ACGIH). The proposed amendments would revise, in part, these ACGIH values by substituting threshold limit values based upon criteria recommended by NIOSH. These changes are proposed to reflect the latest toxicologic evidence in the development of NIOSH recommendations.

Existing regulations establish a very complicated schedule for the collection of high-risk samples (samples collected in the breathing zone of the miner who was exposed to the greatest concentration of respirable coal mine dust). The proposed amendments will simplify sampling procedures, reduce the total number of samples an operator must collect without reducing the amount of necessary data obtained, eliminate much paperwork, and reduce the time lag in present procedures for collecting and processing data and thus aid in achieving more timely enforcement.

Coal mine operators will collect and submit to MESA five (5) samples for the